(30,430)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 465

JOAB H. BANTON, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, STATE OF NEW YORK, AND TRANSIT COMMISSION, STATE OF NEW YORK, APPELLANTS,

vs.

BELT LINE RAILWAY CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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[fol. 1] **IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

In Equity

BELT LINE RAILWAY CORPORATION, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and ALFRED M. BARRETT, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Belt Line Railway Corporation, a corporation organized and existing under the laws of the State of New York, and having its principal place of business in the Borough of Manhattan, City and County of New York, in the Southern District of New York, brings this, its bill of complaint, against Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney of the County of New York, State of New York, and Alfred M. Barrett, constituting the Public Service Commission of the State of New York for the First District; and thereupon your Orator alleges and complains:

I. Your Orator is a street railroad corporation duly incorporated, organized and doing business under the Railroad Laws of the State of New York, being Chapter 49 of the Consolidated Laws of the State of New York, and is the owner of the railroad property, franchise and rights formerly belonging to the Central Park, North and East River Railroad Company, said railroad being located on public streets in the Borough of Manhattan, City of New York, includ- [fol. 2] ing 59th Street between First and Tenth Avenues, on First Avenue between 59th Street and 14th Street and on Tenth Avenue and West Street between 59th Street and the Battery. Your Orator purchased such railroad property, rights and franchise of the Central Park, North and East River Railroad Company in March, 1913, from the purchaser thereof under decree of foreclosure and sale, made February 16, 1911, by the Circuit Court of the United States for the Southern District of New York, in an action entitled "The Farmers' Loan and Trust Company, Complainant, against the Central Park, North and East River Railroad Company, Defendants".

II. The Central Park, North and East River Railroad Company was, on the 19th day of July, 1860, duly incorporated under and in pursuance of an act of the legislature of the State of New York, entitled "An Act to authorize the formation of railroad corporations and to regulate same" passed April 2nd, 1850, being Chapter 140

of the Laws of 1850 and the acts amendatory thereof, and acquired all the rights and franchises acquired by the individual grantees under an act of the legislature entitled "An Act to authorize the construction of a railroad track on South, West and certain other streets in the City of New York", passed April 17th, 1860, being Chapter 511 of the Laws of 1860.

Thereafter, pursuant to said Chapter 511 of the Laws of 1860, on the 28th day of December 1861, the Board of Councilmen, and the Board of Aldermen of the City of New York, adopted a resolution authorizing the Central Park, North and East River Railroad Company to construct, maintain, operate and use said railroad authorized by said Chapter 511 of the Laws of 1860, in, upon and along the several streets and avenues mentioned in said Chapter 511 of the Laws of 1860, including the streets and avenues hereinbefore set forth, and said resolution was approved by the Mayor of the City of New York on December 31st, 1861.

[fol. 3] III. Your Orator is now, and ever since March 22, 1913 has been operating a street surface railroad over and along Fifty-ninth Street between First Avenue and Tenth Avenue, and over and along Tenth Avenue from Fifty-ninth Street to West Street, at or near West 12th Street, and over and along West Street from about West 12th Street to the Battery.

In the month of June, 1919, your Orator duly relinquished and abandoned, with the approval of the Public Service Commission of the State of New York for the First District, pursuant to Section 184 of the Railroad Law, its right, privilege and franchise to maintain and operate a street surface railroad over the streets on the easterly side of the City of New York, between 14th Street and the Battery. The rights, privileges and franchise of your Orator to operate a street railroad over First Avenue between 59th Street and 14th Street, over which avenue the Central Park, North and East River Railroad Company formerly operated, are now being operated by the Dry Dock, East Broadway and Battery Railroad Company, pursuant to agreements with your Orator. Such operation results in a loss to the Dry Dock, East Broadway and Battery Railroad Company, but such losses are not included in the losses of your Orator set forth herein.

The street railroad operated by your Orator on Fifty-ninth Street between First and Tenth Avenues consists of a double track underground slot electric railroad.

The street railroad operated by your Orator on Tenth Avenue between Fifty-ninth Street and Thirty-fourth Street, consists of double track underground slot electric railroad, and the street railroad operated by your Orator on Tenth Avenue and West Street between the Battery and Thirty-fourth Street, is operated by means of electric storage battery cars running over tracks with no overhead or underground construction.

[fol. 4] IV. The defendant, Charles D. Newton, is the Attorney General of the State of New York, and resides in the Village of Geneseo in the State of New York.

V. The defendant, Edward Swann, is the District Attorney of the County of New York, State of New York, and resides in the Borough of Manhattan, City and State of New York.

VI. The defendant, Alfred M. Barrett, constitutes the Public Service Commission of the State of New York for the First District, which includes the City of New York, and is now acting as such Commission, having been duly appointed under and by virtue of the provisions of the Public Service Commissions Law of the State of New York being Chapter 48 of the Consolidated Laws of the State of New York, as amended by Chapter 263 of the Laws of New York for 1919, prescribing his powers and providing for the regulation of certain public service corporations, including your Orator. The said defendant, Alfred M. Barrett, is a citizen of the State of New York, and resides in the Borough of Queens, City of New York, and has his principal office for the transaction of business, in the Borough of Manhattan, City of New York, in the Southern District of New York.

VII. That heretofore and on or about the 29th day of October, 1912, the Public Service Commission of the State of New York for the First District, claiming to act under and by virtue of Section 49 of the Public Service Commissions Law, made an order, a copy of which is hereto annexed and marked "Exhibit A", and which said order is hereinafter called the "order of October 29th, 1912". In and by said order of October 29th, 1912, it was ordered that through routes for continuous trips in the same general direction and joint rates, fares and charges for the transportation over such through routes of passengers between the line of your Orator on Fifty-ninth Street and the lines of the other street surface railroads in New [fol. 5] York City, running north and south (such lines being specifically named in Schedule 1 to 5 inclusive, in said order) should be and the same were thereby established to take effect December 1, 1912 and that the maximum joint rate, fare and charge to be exacted for such through transportation should be, and the same thereby was, fixed at the sum of five cents and that the New York Railways Company, the Central Park, North and East River Railroad Company, the Third Avenue Railway Company, the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company and the Second Avenue Railroad Company in the City of New York, and George W. Linch, its Receiver, should be, and they thereby were required on and after December 1st, 1912 to put in force and maintain the said through routes and joint rates, fares and charges, and, except where through cars were operated, to deliver transfer tickets or other tokens at the said transfer points.

In and by said order of October 29th, 1912, the New York Railways Company, the Central Park, North and East River Railroad Company, the Third Avenue Railway Company, the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company and the Second Avenue Railroad Company in the City of New York and George W. Linch, its Receiver, were required to make, within thirty days from December 1st, 1912, an argeement as to the por-

tion of each of the joint rates, fares or charges to which each of them should be entitled, and to notify the Public Service Commission of the State of New York for the First District on or before January 10th, 1913, whether any such agreements had been entered into and what the terms of such agreements should be.

In and by Section 49 of the Public Service Commissions Law of the State of New York, it is provided that in case such agreement as to the portion of such joint rates, fares or charges, to which each such railroad should be entitled, is not so made within the time so specified by the Commission, the Commission may declare by sup- [fol. 6] plemental order the portion thereof to which each street railroad corporation affected thereby should be entitled, and the manner in which the same should be paid and secured, and that such supplemental order should take effect as part of such original order from the time such supplemental order should become effective.

That thereafter, by agreements made pursuant to said order of October 29th, 1912, the division of said joint rate, fare or charge of five cents was fixed whereby the Central Park, North and East River Railroad Company received two cents thereof, and some one of the following companies: New York Railways Company, the Third Avenue Railway Company, The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company and the Second Avenue Railroad Company, in the City of New York, and George W. Linch its Receiver, received the remaining three (3) cents of the said joint rate, fare or charge according to the company which transported the through route passenger, and this division of joint rate was continued upon the succession of your Orator to ownership of the property of the Central Park, North and East River Railroad Company, and two (2) cents is the most that your Orator has ever received, or is entitled to receive, of said joint rate, fare or charge of five cents.

The ratio between the distance which a through route passenger could and can travel over the lines mentioned in said order of October 29th, 1912, other than the Fifty-ninth Street Line of your Orator, as compared with the distance which such a passenger could and can travel over the Fifty-ninth Street Line of your Orator, under said order, was and is not less than three to two, and such ratio of three to two was the ratio used in fixing the division of the joint rate of five cents established by said order of October 29th, 1912.

Thereafter, and on the 24th day of October, 1919 the Public Service Commission of the State of New York for the First District, on the application of your Orator, and after a hearing had been held on said application, made an order granting to your Orator permission to put into effect immediately after publication at stations, and filing with the Commission changes in its tariff schedules, providing for the discontinuance of transfers between the Fifty-ninth Street Crosstown Line of your Orator, and the Eighth Avenue Line of the Eighth Avenue Railroad Company, formerly operated by New York Railways Company, the Sixth and Amsterdam Avenue Line, and the Broadway and Columbus Avenue Line, both

operated on Ninth Avenue and both formerly having been operated by the New York Railways Company on the franchise of the Ninth [fol. 7] Avenue Railroad Company and thereafter pursuant to said order of the Public Service Commission dated October 24, 1919 the giving and receiving of transfers between the Fifty-ninth Street Crosstown Line and such line above mentioned was discontinued and the through routes between such line were thereby abolished.

Thereafter, and on or about the 27th day of February, 1920, on the application of your Orator, the Public Service Commission of the State of New York, made an order granting permission to your Orator to file and put into effect amendments to its tariff schedule to take effect March 1st, 1920, which changes provided for the discontinuance of transfers between the Fifty-ninth Street Crosstown Line of your Orator and the Fourth and Madison Avenue Line of the New York and Harlem Railroad Company, which had previously been operated by the New York Railways Company, and thereafter on and after March 1st, 1920, pursuant to said order of the Public Service Commission, dated February 27th, 1920, the giving and receiving of transfers between the Fifty-ninth Street Crosstown Line of your Orator and the Fourth and Madison Avenue Line of the New York and Harlem Railroad Company, was discontinued and the through routes between such lines were thereby abolished.

With the exception of the foregoing changes approved by the Public Service Commission of the State of New York for the First District, your Orator has during the entire time it has operated its street railroad, complied, and is now complying with the said order of October 29, 1912.

VIII. The outstanding capital stock, first mortgage bonds and note payable of your Orator, represent, and were issued for the fair and reasonable market value of the property of your Orator, and are only such as have been authorized and approved by the Public Service Commission of the State of New York for the First District, under [fol. 8] and pursuant to the provisions of Section 55 of the public Service Commissions Law, as follows:

Capital stock, bonds and notes authorized by Public Service Commission of the State of New York for the First District to be issued are as follows:

Capital Stock

By order of such Commission dated March 19th, 1913, in case No. 1606, a copy of which said order is hereto annexed and marked "Exhibit B"	$431,300.
[fol. 9] By order of such Commission dated July 22, 1913 in case No. 1703, a copy of which said order is hereto annexed and marked "Exhibit C".....	49,700.
By order of such Commission dated November 7, 1913, in case No. 1723 a copy of which said order is hereto annexed and marked "Exhibit D".....	253,000.
	$734,000.

Bonds

First Mortgage 5% Bonds authorized by Public Service Commission of the State of New York for the First District, by order dated March 19, 1913, in case No. 1606 a copy of which said order is hereto annexed and marked "Exhibit B"	1,750,000.

Note

Notes Payable authorized by Public Service Commission of the State of New York for the First District, by order dated October 8, 1915, in case No. 1778, for the purpose of refunding moneys advanced for construction, a copy of which said order is hereto annexed and marked "Exhibit E".....	73,091.53
	$2,557,091.53

The capital stock, bonds and note of your Orator, as above set forth, were issued only for the acquisition of property, and the payment of moneys actually advanced for construction after the Public Service Commission of the State of New York for the First District had determined, upon evidence before it, at hearings held from time to time prior to the issuance of such orders, that the property so to be acquired by your Orator, and the construction work already done on the railroad of your Orator, were of the value of the par of said stock, bonds and note, aggregating $2,557,091.53.

The fair and reasonable market value of the property of your Orator and the construction work done on the railroad of your Orator at the time of the issuance of the above mentioned capital [fol. 10] stock, bonds and note, was not less than the sum of $2,557,091.53.

IX. In and by the Public Service Commissions Law, being Chapter 48 of the Consolidated Laws of the State of New York, every street railroad corporation, including your Orator, is required to file an annual and other reports with the Public Service Commission, verified by the oath of one of its officers and the said Public Service Commission is empowered by said law, to prescribe the form of such reports and the character of the information to be contained therein; and in and by said law, the Public Service Commission of the State of New York for the First District, may require reports of street railroad corporations, including your Orator, to contain information in relation to rates or regulations concerning fares, agreements or contracts affecting the same; and in and by said Public Service Commissions Law, when the report of any such corporation or person, including your Orator, is defective or believed to be erroneous, the said Public Service Commission of the State of New York for the First District, is empowered to require amendments thereof; and in and by said Public Service Commissions Law, the Public Serv-

ice Commission of the State of New York for the First District may also require street railroad corporations, including your Orator, to file periodic reports in the form covering the period and at the time prescribed by such Commission, and in connection with such reports, may require street railroad corporations, including your Orator, to make specific answers to questions upon which the said Commission may need information.

The said Public Service Commission of the State of New York for the First District, in the year 1908, prescribed a uniform system of accounts to be observed by street railroad corporations, including your Orator, and since the incorporation of your Orator, and the [fol. 11] commencement of its business, has from time to time prescribed the form and detail of periodic reports to be made by your Orator, and the said Public Service Commission of the State of New York for the First District has from the time of the commencement of business by your Orator, exercised fully the powers of scrutiny and supervision conferred upon it by the said Public Service Commissions Law. Your Orator has complied with and conformed in all respects to the said system of accounts as prescribed by the Public Service Commission of the State of New York for the First District, and has kept its books and records, including operating details, in full compliance with the directions of the said Public Service Commission of the State of New York for the First District, and said Commission, has constantly exercised supervision over the accounts and books, operating expenditures, finances and transactions of your Orator. In and by the said accounts of your Orator, so kept in pursuance of the provisions of the Statute, and the said uniform system of accounts, and under the supervision of the said Public Service Commission, and in and by the verified reports of your Orator made according to law, the receipts and expenditures of your Orator, and full information regarding the street railroad operations and business of your Orator have been and are from time to time furnished to the said Public Service Commission of the State of New York for the First District, as directed or desired by it, and have been and are under and subject to the audit, check and supervision of said Public Service Commission, and its authorized representatives. The said Public Service Commission of the State of New York for the First District has from time to time reported to the Legislature the facts so disclosed by your Orator and has informed the general pub- [fol. 12] lic thereof, by and in the reports required of the said Commission by the said Public Service Commissions Law of the State of New York.

X. Your Orator, has, ever since it commenced the operation of its said street surface railroad on March 22nd, 1913, complied with the provisions of the said order of October 29th, 1912.

XI. Ever since the time your Orator commenced the operation of its street surface railway on the 22nd day of March, 1913, the cost of carrying each passenger transported on the lines of your Orator, not including or allowing for any depreciation, nor for any payment of

interest on the above mentioned bonds and note, nor for any return on the above mentioned capital stock, has always been in excess of two cents.

The average cost of carrying each passenger transported on the lines of your Orator, including each passenger transported pursuant to, and in compliance with the order of October 29th, 1912, during the years ending, respectively, June 30th, 1918, June 30th, 1919 and June 30th, 1920, and during the four months ended October 31st, 1920, not including or allowing for any depreciation, nor for any return on the above mentioned capital stock of your Orator, nor for any return on any of the capital stock of your Orator excepting the interest at 5% per annum actually due on the above mentioned bonds and note, has been as follows:

	Year ended June 30, 1918	Year ended June 30, 1919	Year ended June 30, 1920	Four months ended Oct. 31, 1920
Average cost per passenger carried	3.20¢	3¢	3.46¢	3.96¢

and the average cost of carrying each through route passenger over the lines of your Orator pursuant to said order of October 29th, 1912, during the periods above mentioned, has been the respective amounts above set forth, whereas your Orator has only been receiving two cents for carrying each passenger transported pursuant to the order of October 29th, 1912.

[fol. 13] Annexed hereto and marked, respectively, Exhibits F, G, H and I, are schedules showing the income from operations and the cost of operations of your Orator during the years ending June 30th, 1918, June 30th, 1919, June 30th, 1920 and during the four months ended October 31st, 1920, which exhibits show the details of the above average cost per passenger carried, as hereinabove set forth.

Annexed hereto and marked "Exhibit J" is an Income Statement of the operations of your Orator from the time it commenced business on March 22nd, 1913, to October 31st, 1920 showing that the operations of the street surface railroad of your Orator have resulted in the following losses, without any allowance for depreciation and without any allowance for a return on its capital stock, and without any allowance for a return on any of the capital of the Company, excepting the interest actually due on its bonds and note, as hereinabove set forth:

	For year ended June 30, 1917	For year ended June 30, 1918	For year ended June 30, 1920	For four months ended October 31, 1920
Losses	$118,186.36	$31,889.31	$20,814.82	$28,120.27

The deficits from the operation of the railroad of your Orator from the commencement of its business on March 22, 1913 to October 31st, 1920, amounted to $201,270.13, without including any allowance for depreciation since January 1, 1916 and including the retirements of capital which your Orator has been ordered to make by the Public Service Commission of the State of New York for the First District.

XII. Heretofore and on or about the 18th day of May, 1920, your Orator filed with the Public Service Commission of the State of New York for the First District, a petition, verified by the oath of its Vice-President, on the 18th day of May, 1920, praying for the modification of the order of October 29th, 1912, so that the exchange of trans- [fol. 14] fers between the lines operated by your Orator, and the lines operated by all the street surface railroad companies named in the order dated October 29th, 1912, with the exception of the Third Avenue Railway Company, and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, should be discontinued.

Thereafter, and on the 22nd day of May, 1920, your Orator filed with the Public Service Commission of the State of New York for the First District, first revised pages numbers 2 and 3, and second revised page Number 9, of your Orator's Tariff, showing discontinuance of the through routes established by the said order of October 29th, 1912, excepting the through routes established between the lines of your Orator, and the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company. Thereafter, and on or about the 18th day of June, 1920, the Public Service Commission of the State of New York for the First District, made an order postponing the effective date of the revised pages of your Orator's tariff schedule above specified, and suspending the operation thereof, and deferring the use of the fares, regulations and practices therein stated, until the 22nd day of July, 1920.

Commencing with May 27th, 1920, and continuing until and including June 14th, 1920, hearings were held on the above mentioned petition of your Orator, verified May 18th, 1920 praying for such discontinuance of the exchange of transfers, at which your Orator proved the losses from operation hereinabove set forth (excepting those losses accruing subsequent to March 31st, 1920) and thereafter on or about the 9th day of July, 1920, the said Public Service Commission of the State of New York for the First District, made an order a copy of which is hereto annexed and marked "Exhibit K," wherein and whereby the said Commission ordered that the [fol. 15] maximum joint rate, fare or charge to be exacted for through transportation over any through route established by its order of October 29th, 1912, which through route involves a transfer by a passenger from the lines of one to another of the following companies: the New York Railways Company, the Central Park, North and East River Railroad Company, and the Second Avenue Railroad Company in the City of New York, should be and the same thereafter was fixed, commencing September 13, 1920, at the sum of seven cents instead of five cents, and wherein and whereby your Orator (as successor to the Central Park, North and East River Railroad Company) and the New York Railways Company, and its Receiver, and the Second Avenue Railroad Company in the City of New York, and its Receiver, were required to make, within thirty days from and after September 13th, 1920, agreements as to the portion of each of the joint rates, fares or charges, to which each

of them should be entitled, and to notify the Commission, on or before November 1st, 1920, whether any such agreements had been entered into, and what the terms of such agreements might be, and wherein and whereby your Orator, as successor to the Central Park, North and East River Railroad Company, and the New York Railways Company, and its receiver, and the Second Avenue Railroad Company in the City of New York, and its receiver were required to file with said Commission, new supplemental or amended schedules showing the changes in their existing schedules indicated in said order of July 9th, 1920, and wherein and whereby the first revised pages Numbers 2 and 3, and second revised page Number 9 of your Orator's tariff, filed with such Commission under date of May 24th, 1920, was annulled, and wherein and whereby your Orator and the New York Railways Company, and its receiver, and the Second Avenue Railroad Company in the City of New York, and its receiver, were required to notify the Commission in writing not later than September 1, 1920, whether the terms of such order were accepted [fol. 16] and would be obeyed.

Thereafter, and on or about the 23rd day of July, 1920, your Orator applied in writing to the Public Service Commission of the State of New York for the First District, for a rehearing in respect of the matters determined in and by said order of July 9th, 1920, and on the 4th day of November, 1920, the said Public Service Commission of the State of New York for the First District, made an order reciting the application of your Orator for a re-hearing, wherein and whereby it was ordered that said application for rehearing was granted, and such re-hearing was ordered to be had by and before the Commission, on the 5th day of November 1920 at ten o'clock in the forenoon, and wherein and whereby it was further ordered as follows:

"Further ordered that the several dates specified in said order of July 9th, 1920, on or before which any act is authorized or required to be done, or performed by said corporations (or said receiver) or any of them, be and the same hereby are deferred and postponed until such date or dates as shall or may be fixed by the Commission at or after the termination of said re-hearing."

Thereafter, hearings were held on said re-hearing by the Public Service Commission of the State of New York for the First District, on the 5th day of November, 1920, and on the 10th day of November, 1920, and on the 10th day of November 1920, the matter was finally submitted to the Public Service Commission of the State of New York for the First District, and the case was closed.

The Public Service Commission of the State of New York for the First District has refused and neglected for more than thirty days to determine the matters submitted on such re-hearing, contrary to, and in violation of, the provisions of section 22 of the said Public Service Commissions Law of the State of New York.

The Public Service Commission of the State of New York for the First District has refused to determine the matter submitted on [fol. 17] such re-hearing, and although requested by your orator, has also refused to permit your Orator to do any act authorized to be done or performed by the said order of July 9th, 1920.

That said order of July 9th, 1920, a copy of which is hereto annexed and marked "Exhibit K" is an admission by the Public Service Commission of the State of New York for the First District, that the joint rate, fare or charge of five cents as fixed by the order of October 29th, 1912, was insufficient for the service rendered, and the acts of the said Commission as hereinabove set forth, especially those acts whereby all acts authorized by the order of July 9th, 1920, have been indefinitely deferred and postponed, have denied to your Orator the right to be relieved from the order of October 29th, 1912, which obligates your Orator to furnish through transportation at a joint rate of five cents, which as before stated, has been found by the Commission to be insufficient for the service rendered.

XIII. The said order of October 29th, 1912, has ever since March 22nd, 1913, the date of the commencement of business of your Orator, deprived your Orator and does now, and will continue to deprive your Orator, of any return whatever upon the reasonable value of its property devoted to street railroad purposes, and at no time since the said order of October 29th, 1912 went into effect has it permitted your Orator to earn a fair return thereon; and the said act is in violation of Section 10, of Article I of the Constitution of the United States, in that it impairs the obligation of your Orator's contract with the State of New York; and it is also in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives your Orator of its property without due process of law, and denies to it the equal protection of the law.

XIV. Your Orator is advised by Counsel, and verily believes that if your Orator should fail to comply with the said order of October [fol. 18] 29th, 1912, your Orator would be liable to forfeit to the People of the State of New York, not to exceed the sum of Five Thousand dollars ($5,000) for each and every offense, and that in case of a continuing violation, every day's continuance thereof would be and be deemed to be a separate and distinct offense, and that in addition thereto, every officer and agent of your Orator who failed to obey and observe and comply with such order, or who procured, aided or abetted your Orator in its failure to obey and comply with the same, would be guilty of a misdemeanor, and subject to imprisonment for not more than one year for each offense, and a fine of not more than Five hundred dollars for each offense, or both such fine and imprisonment for each offense, and that it would be the duty of the defendants herein, Charles D. Newton, as Attorney General of the State of New York, Edward Swann as District Attorney of the County of New York, and Alfred M. Barrett, constituting the said Public Service Commission of the State of New York for the

First District, to prosecute your Orator, and its officers for each and every violation of said order, and to endeavor to enforce and collect the penalties prescribed by law in connection therewith, and it would be the duty of the defendant Alfred M. Barrett, constituting the said Public Service Commission of the State of New York for the First District, to cause suits in mandamus or for injunction to be brought against your Orator, under Section 57 of the Public Service Commission's Law of the State of New York.

Your Orator is advised by Counsel and therefore avers and claims that there is no remedy except in equity to test adequately the validity of the said order of October 29, 1912, and that in the absence of such remedy in equity the penalties provided in the Public Service Commission's Law would be unreasonable and confiscatory, [fol. 19] and would deprive your Orator of its liberty of contract, and of its property without due process of law, and without just compensation, and would likewise deny to it the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States, on which account your Orator invokes the jurisdiction of this Court to protect it against the aforesaid threatened invasion by the defendants of its inherent rights under and guaranteed by the said Constitution.

XV. Your Orator prays reference to the entire contents of all the exhibits hereto annexed, marked "Exhibits A, B, C, D, E, F, G, H, I, J and K" respectively, with the same force and effect as if the same were herein specifically set forth in full.

VI. The value of the business and property of your Orator, which is involved in this suit is greatly in excess of Three thousand Dollars.

XVII. To the end that your Orator may have that relief which it can only obtain in a Court of Equity, and that the defendants may each answer the premises, but not under oath or affirmation, the benefit whereof is hereby expressly waived by your Orator, it hereby prays:

I. That it be adjudged and decreed that said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, in so far as it fixes at five cents the maximum joint rate or fare to be exacted for through transportation over the lines of your Orator, and the lines operated by all other street surface railway corporation or any of them, named in said order (excepting Third Avenue Railway Company and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company) and insofar as it requires your Orator to maintain [fol. 20] the through routes therein mentioned, and the joint rates, fares and charges therein mentioned (excepting such through routes and joint rates, fares and charges as we are between lines of your Orator and lines of Third Avenue Railway Company and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company) and insofar as it requires your Orator to deliver and receive transfers or other tokens entitling passengers to ride over the

lines of your Orator, and the lines of any other street surface railway corporation named in said order (excepting the Third Avenue Railway Company and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company) is illegal and void, because in contravention of Section 10 of Article I of the Constitution of the United States, and because in contravention of the Fourteenth Amendment to the Constitution of the United States, as aforesaid.

II. That it be adjudged and decreed that your Orator has no adequate remedy at law for the injury which will result from the further enforcement of said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, and such injury will be irreparable.

III. That it be adjudged and decreed that your Orator be granted writs of injunction, both temporary and permanent, issuing out of and under the seal of this Honorable Court, against the defendants, restraining them, and each of them, and their, and each of their officers, agents, servants and employes, and any and every person [fol. 21] acting under and by virtue of the authority of the said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, and the Public Service Commissions Law of the State of New York, and any other law of the State of New York, insofar as any of said laws relates or provides for the enforcement of said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, from in any way enforcing or attempting to enforce the provisions of said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, against your Orator (excepting insofar as said order provides for Joint rates, fares and charges between the lines of your Orator and the lines of the Third Avenue Railway Company, and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company), and from bringing any action thereon to enforce any penalties against your Orator, and from bringing any action or proceeding in mandamus or for an injunction in any court whatsoever, for the purpose of compelling compliance by your Orator with the said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912 (excepting insofar as said order provides for joint rates, fares and charges between the lines of your Orator and the lines of the Third Avenue Railway Company, and The Forty-second Street, Manhat- [fol. 22] tanville and St. Nicholas Avenue Railway Company) and from doing any act or thing interfering with the right or authority of your Orator forthwith to discontinue the carrying out of the provisions of the order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, (excepting insofar as said order provides for joint rates, fares and charges between the lines of your Orator, and the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company) and from doing

any act or thing interfering with the right or authority of your Orator forthwith to exact and charge or receive for transportation upon its lines, the same rates and fares which it might lawfully exact and charge, if the provisions of said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, relative to the rate to be exacted or charged by your Orator, were not operative (excepting only as to passengers transferring to or from the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company).

IV. Your Orator further prays that it have such other further or different relief as to the Court may seem meet, and the nature of the case may require.

V. Your Orator further prays that your Honors grant unto your Orator a writ of subpœna ad respondendum, issuing out of and [fol. 23] under the seal of this Honorable Court, to be directed to the said defendants, commanding them, and each of them, on a certain day and under a certain penalty, to be therein inserted, to appear before your Honors in this Honorable Court, and then and there full, true, direct and perfect answer to make, to all and singular the premises, and further to stand, do, perform and abide by, such further order and decree as to your Honors may seem meet.

And your Orator will ever pray, etc.

Belt Line Railway Corporation, by S. W. Huff, President.
Alfred T. Davison, Solicitor for Complainant, No. 2396 Third Avenue, New York City, N. Y.

[fol. 24] Jurat showing the foregoing was duly sworn to by S. W. Huff omitted in printing.

[fol. 25] EXHIBIT A TO BILL OF COMPLAINT

At a Stated Meeting of the Public Service Commission for the First District, duly held at its office, No. 154 Nassau Street, in the Borough of Manhattan, City and State of New York, on the 29th day of October, 1912.

Present: William R. Willcox, Chairman; Milo R. Maltbie, John E. Eustis, J. Sergeant Cram, George V. S. Williams, Commissioners.

Case No. 1364

Order after Rehearing Changing Order Establishing Through Routes and Prescribing Maximum Joint Rates Made and Filed Herein December 5, 1911

In the Matter of the Hearing on the Motion of the Commission as to Rates of Fare Upon Connecting or Intersecting Lines of Street Railroad, in the Borough of Manhattan, City of New York

New York Railways Company having presented to the Commission its application in writing, dated October 21, 1912, praying that said Company be made a party hereto and that the Commission grant a rehearing herein as to the matters determined by the order of the Commission made and filed herein December 5, 1911, to the end that a new order regulating exchange of transfers for a single five cent fare may be made which will be accepted by the several street rail- [fol. 26] road corporations involved in place of the order of the Commission made herein and filed December 5, 1911, and the petition that said New York Railways Company be made a party hereto having been granted, and said New York Railways Company, by order made and filed October 22, 1912, having been allowed to intervene in this proceeding and to become a party hereto with the same force and effect as if it had been a party hereto from the commencement hereof without prejudice to any of the proceedings already had, and, sufficient reason therefor being made to appear, the Commission having by order made and filed October 22, 1912, granted upon said application of said New York Railways Company a rehearing herein, and such rehearing having come on before the Commission on the 25th day of October, 1912, all the Commissioners being present and presiding, the New York Railways Company, the Central Park, North and East River Railroad Company, the Third Avenue Railway Company, the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company, the Second Avenue Railroad Company in the City of New York, and George W. Linch, its Receiver, having separately appeared by counsel or by officers of said companies, respectively, and the Commission being of opinion after said rehearing and a consideration of the facts, including those arising since the making of said order of December 5, 1911, that said order of December 5, 1911, should be changed as hereinafter set forth, it is

Ordered, that said order of December 5, 1911, be changed to read as set forth below, the same as changed to take effect when and only when the New York Railways Company, the Central Park, North and [fol. 27] East River Railroad Company, the Third Avenue Railway Company, the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company, the Second Avenue Railroad Company in the City of New York, and George W. Linch, its Receiver, shall all notify the Commission in pursuance of the provisions of such order that the terms of said order are accepted and will be obeyed;

A hearing having been duly had pursuant to a notice of hearing adopted June 27, 1911, and an order having been duly made herein

on July 11, 1911, requiring the Metropolitan Street Railway Company and Adrian H. Joline and Douglas Robinson, its Receivers, the Third Avenue Railroad Company and Frederick W. Whitridge, its Receiver, the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company and Frederick W. Whitridge, its Receiver, the Dry Dock, East Broadway and Battery Railroad Company and Frederick W. Whitridge, its Receiver, the Kingsbridge Railway Company, the Second Avenue Railroad Company in the City of New York and George W. Linch, its Receiver, the Central Park, North and East River Railroad Company, the South Shore Traction Company and Paul T. Brady and Willard V. King, its Receivers, and Twenty-eighth and Twenty-ninth Streets Crosstown Railroad Company and Joseph B. Mayer, its Receiver, on or before August 10, 1911, to establish through routes and joint rates, fares and charges for the transportation of passengers between the lines and at the points named in said order, and except where through cars are operated, to deliver transfer slips or other tokens to each passenger applying for the same and that they receive the same at said points for a continuous journey over said lines; and none of the said through routes or joint rates hav- [fol. 28] ing been established by the said companies or their Receivers within the time specified in the said order or since, and the hearing having been continued before the Commission on certain days, and each of the companies and each of the Receivers named above having been given an opportunity to be heard and testimony having been taken on the question of the proper joint rates, fares and charges to be exacted as a maximum charge.

Ordered,

(1) That through routes for continuous trips in the same general direction and joint rates, fares and charges for the transportation over such through routes of passengers between the lines of the companies named in Schedules 1 to 5, inclusive, below, be and they hereby are established to take effect December 1, 1912; that the maximum joint rate, fare and charge to be exacted for such through transportation be and the same hereby is fixed at the sum of five cents, and that the New York Railways Company, the Central Park, North and East River Railroad Company, the Third Avenue Railway Company, the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company and the Second Avenue Railroad Company in the City of New York, and George W. Linch, its Receiver, be and they hereby are required on and after December 1, 1912, to put in force and maintain the said through routes and joint rates, fares and charges and except where through cars are operated to deliver and receive transfer tickets or other tokens at the said transfer points.

(2) That the New York Railways Company, the Central Park, North and East River Railroad Company, the Third Avenue Rail- [fol. 29] way Company, the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company and the Second Avenue Railroad Company in the City of New York, and George W. Linch, its Receiver, be and they hereby are required to make, within thirty days from and after December 1, 1912, an agreement as to the portion of

each of the joint rates, fares or charges to which each of them shall be entitled and to notify the Commission on or before January 10, 1913, whether any such agreements have been entered into and what the terms of such agreements may be.

(3) Nothing in this order shall be construed as in any way authorizing the abandonment of any free transfer now given or an increase in any fare now charged.

(4) That the order of this Commission made and entered on the 2nd day of August, 1910, as to a through route and joint rate between the lines operated by the Metropolitan Street Railway Company, or its Receivers, and the Central Park, North and East River Railroad Company be and the same hereby is abrogated.

Further ordered, that this order take effect when and only when the New York Railways Company, the Central Park, North and East River Railroad Company, the Third Avenue Railway Company, the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company and the Second Avenue Railroad Company in the City of New York, and George W. Linch, its Receiver, shall all in writing notify the Commission that the terms of this order are accepted and will be obeyed; and that this order thereafter remain in force as to each through route and joint rate until modified or abrogated by further [fol. 30] order of the Commission.

Further ordered, that on or before November 6th, 1912, the said New York Railways Company, the Central Park, North and East River Railroad Company, the Third Avenue Railway Company, the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company and the Second Avenue Railroad Company in the City of New York, and George W. Linch, its Receiver, each of them notify the Commission whether the terms of this order are accepted and will be obeyed, and have leave to make said change in rate to be charged effective by change of existing schedules as filed on two days' notice.

Further ordered, that this proceeding be adjourned until the 7th day of November, 1912, at 2.30 o'clock in the afternoon of such day pending notification to the Commission as to acceptance of this order or as to agreement for the division of fares. The said Schedules 1 to 5 are as follows:

New York Railways Company Lines

Fare paid New York Railways Company on	First transfer to Central Park, North and East River Railroad Company on	Retransfer to New York Railways Company on
Lexington Av. South.....	59th Street Line West.....	6th Av. Line South
Lexington Av. South.....	59th Street Line West.....	7th Av. Line South
Lexington Av. South.....	59th Street Line West.....	B'way-7th Av. Line South
Lexington Av. South.....	59th Street Line West.....	8th Av. Line South
Lexington Av. South.....	59th Street Line West.....	B'way-Columbus Line South
Lexington Av. South.....	59th Street Line West.....	B'way-Amsterdam Av. South
Lexington Av. South.....	59th Street Line West.....	6th Av.-Amsterdam South
Lexington Av. South.....	59th Street Line East or West to termini of 59th Street Line.....	
Lexington Av. North.....	59th Street Line West.....	8th Av. Line North
Lexington Av. North.....	59th Street Line West.....	B'way-Columbus Av. North
Lexington Av. North.....	59th Street Line West.....	B'way-Amsterdam North
Lexington Av. North.....	59th Street Line West.....	6th-Amsterdam Av. North
Lexington Av. North.....	59th Street Line East or West to termini of 59th Street Line.....	
Madison Av. South.....	59th Street Line West.....	6th Av. Line South
Madison Av. South.....	59th Street Line West.....	7th Av. Line South
Madison Av. South.....	59th Street Line West.....	7th Av.-B'way Line South
Madison Av. South.....	59th Street Line West.....	8th Av. Line South
Madison Av. South.....	59th Street Line West.....	B'way-Columbus Av. South
Madison Av. South.....	59th Street Line West.....	B'way-Amsterdam Av. South
Madison Av. South.....	59th Street Line West.....	6th Av.-Amsterdam South
Madison Av. South.....	59th Street Line East or West to termini of 59th Street Line.....	

Schedule 1, p. 2

New York Railways Company Lines

Fare paid New York Railways Company on	First transfer to Central Park, North and East River Railroad Company on	Retransfer to New York Railways Company on
Madison Av. North.....	59th Street Line West.....	8th Av. Line North
Madison Av. North.....	59th Street Line West.....	B'way-Columbus Av. North
Madison Av. North.....	59th Street Line West.....	B'way-Amsterdam North
Madison Av. North.....	59th Street Line West.....	6th Av.-Amsterdam North
Madison Av. North.....	59th Street Line East or West to termini of 59th Street Line.....	
6th Ave.-Amsterdam South...	59th Street Line East	Madison Av. South
6th Ave.-Amsterdam South...	59th Street Line East	Lexington Av. South
6th Ave.-Amsterdam South...	59th Street Line East or West to termini of 59th Street Line.....	
6th Av.-Amsterdam North....	59th Street Line East	Madison Av. North
6th Av.-Amsterdam North....	59th Street Line East	Lexington Av. North
6th Av.-Amsterdam North....	59th Street Line East or West to termini of 59th Street Line.....	
7th Av. North.....	59th Street Line East	Madison Av. North
7th Av. North.....	59th Street Line East	Lexington Av. North
7th Av. North.....	59th Street Line East or West to termini of 59th Street Line.....	
8th Av. North.....	59th Street Line East	Madison Av. North
8th Av. North.....	59th Street Line East	Lexington Av. North
8th Av. North.....	59th Street Line East or West to termini of 59th Street Line.....	
8th Av. South.....	59th Street Line East	Madison Av. South
8th Av. South.....	59th Street Line East	Lexington Av. South
8th Av. South.....	59th Street Line East or West to termini of 59th Street Line.....	

Schedule 1, p. 3

New York Railways Company Lines

Fare paid New York Railways Company on	First transfer to Central Park, North and East River Railroad Company on	Retransfer to New York Railways Company on
B'way-Columbus South	59th Street Line East	Madison Av. South
B'way-Columbus South	59th Street Line East	Lexington Av. South
B'way-Columbus South	59th Street Line East or West to termini of 59th Street Line.....	
B'way-Columbus North	59th Street Line East	Madison Av. North
B'way-Columbus North	59th Street Line East	Lexington Av. North
B'way-Columbus North	59th Street Line East or West to termini of 59th Street Line.....	
B'way-Amsterdam South	59th Street Line East	Madison Av. South
B'way-Amsterdam South	59th Street Line East	Lexington Av. South
B'way-Amsterdam South	59th Street Line East or West to termini of 59th Street Line.....	
B'way-Amsterdam North	59th Street Line East	Madison Av. North
B'way-Amsterdam North	59th Street Line East	Lexington Av. North
B'way-Amsterdam North	59th Street Line East or West to termini of 59th Street Line.....	
6th Av. North.....	59th Street Line East	Madison Av. North
6th Av. North.....	59th Street Line East	Lexington Av. North
6th Av. North.....	59th Street Line East or West to termini of 59th Street Line.....	

		Retransfer to Second Avenue Railroad Company on
8th Av. South.....	59th Street Line East	2nd Av. Line South
8th Av. North.....	59th Street Line East	2nd Av. Line North
8th Av. North.....	59th Street Line East	1st Av. Line North

Schedule 1, p. 4

New York Railways Company Lines

Fare paid New York Railways Company on	First transfer to Central Park, North and East River Railroad Company on	Retransfer to New York Railways Company on Madison Av. north
B'way-7th Av. North.....	59th Street Line East	Lexington Av. North
B'way-7th Av. North.....	59th Street Line East	
B'way-7th Av. North.....	59th Street Line East or West to termini of 59th Street Line.....	

Central Park, North & East River Railroad Company

Fare paid Central Park, North & East River Railroad Co. on	Transfer to New York Railways Co. on
59th Street Line East	B'way-Amsterdam Av. North or South
59th Street Line East	B'way-Columbus Av. North or South
59th Street Line East	6th & Amsterdam Av. North or South
59th Street Line East	8th Avenue Line North or South
59th Street Line East	7th Avenue Line South
59th Street Line East	7th Avenue-Broadway Line South
59th Street Line East	Madison Avenue Line North or South
59th Street Line East	Lexington Avenue Line North or South
59th Street Line East	Sixth Avenue Line South
59th Street Line West	Lexington Avenue Line North or South
59th Street Line West	Madison Avenue Line North or South
59th Street Line West	6th Avenue Line South
59th Street Line West	7th Avenue Line South
59th Street Line West	7th Avenue-Broadway South
59th Street Line West	8th Avenue Line North or South
59th Street Line West	Broadway-Columbus Avenue North or South
59th Street Line West	Broadway-Amsterdam Avenue North or South
59th Street Line West	6th Avenue-Amsterdam North or South

	Transfer to 42nd Street, Manhattanville & St. Nicholas Ave. Ry. Co.
59th Street Line East	Broadway Branch, North or South
59th Street Line West	Broadway Branch, North or South
59th Street Line West	10th Avenue Line North or South

	Transfer to 3rd Avenue Railway Co. on
59th Street Line East	3rd Avenue Line North or South
59th Street Line West	3rd Avenue Line North or South

	Transfer to 2nd Avenue Railroad Co. on
59th Street Line East	2nd Avenue Line North or South
59th Street Line East	1st Avenue Line North
59th Street Line West	2nd Avenue Line North or South

[fol. 35]

Schedule 3

3rd Avenue Railway Company

Fare paid 3rd Avenue Railway Company on	First transfer to Central Park, North and East River Railroad Company on	Retransfer to 42nd Street, Manhattanville & St. Nicholas Avenue Ry. Co. on
Third Avenue South	59th Street Line West	Broadway Branch Line South
Third Avenue South	59th Street Line West	10th Avenue Branch Line South
Third Avenue South	59th Street Line East or West to termini of 59th Street Line	
Third Avenue North	59th Street Line West	Broadway Branch Line North
Third Avenue North	59th Street Line West	10th Avenue Branch Line North
Third Avenue North	59th Street Line East or West to termini of 59th Street Line	

Schedule 4

42nd Street, Manhattanville & St. Nicholas Avenue Railway Co.

Fare paid 42nd Street, Manhattanville & St. Nicholas Avenue Ry. Co.	First transfer to Central Park, North and East River Railroad Company on	Retransfer to 3rd Avenue Ry. Co. on
Broadway Branch South	59th Street Line East	Third Avenue Line South
Broadway Branch South	59th Street Line East or West to termini of 59th Street Line.....	
Broadway Branch North	59th Street Line East	Third Avenue Line North
Broadway Branch North	59th Street Line East or West to termini of 59th Street Line.....	
Tenth Avenue South	59th Street Line East	Third Avenue Line South
Tenth Avenue South	59th Street Line East or West to termini of 59th Street Line.....	
Tenth Avenue North	59th Street Line East	Third Avenue Line North
Tenth Avenue North	59th Street Line East or West to termini of 59th Street Line.....	

		Retransfer to 2nd Avenue Railroad Company on
Broadway Branch South	59th Street Line East	2nd Av. Line South
Broadway Branch North	59th Street Line East	2nd Av. Line North
Broadway Branch North	59th Street Line East	1st Av. Line North

Schedule 5

2nd Avenue Railroad Company, George W. Linch, Receiver

Fare paid 2nd Avenue Railway Company on	First transfer to Central Park, North & East River Railroad Company on	Retransfer to 42nd Street, Manhattanville & St. Nicholas Avenue Railway Co. on
1st Avenue South.....	59th Street Line West.....	Broadway Branch Line South
2nd Avenue South.....	59th Street Line West.....	Broadway Branch Line South
2nd Avenue North.....	59th Street Line West.....	Broadway Branch Line North
		Retransfer to New York Railways Company on
1st Avenue South.....	59th Street Line West.....	8th Avenue Line South
2nd Avenue South.....	59th Street Line West.....	8th Avenue Line South
2nd Avenue North.....	59th Street Line West.....	8th Avenue Line North
1st Avenue South.....	59th Street Line West or East to termini of 59th Street Line.....	
2nd Avenue South.....	59th Street Line East or West to termini of 59th Street Line.....	
2nd Avenue North.....	59th Street Line East or West to termini of 59th Street Line.....	

By the Commission.

Travis H. Whitney, Secretary. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above with the original adopted by said Commission on October 29, 1912, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission, this 31st day of October, 1912.

Travis Whitney, Secretary. (Seal.)

[fol. 37] EXHIBIT B TO BILL OF COMPLAINT

At an adjourned meeting of the Public Service Commission for the First District, duly held at its office, No. 154 Nassau Street, in the Borough of Manhattan, City and State of New York, on the 19th day of March, 1913.

Present: Edward E. McCall, Chairman; Milo R. Maltbie, John E. Eustis, J. Sergeant Cram, George V. S. Williams, Commissioners.

Case No. 1606

In the Matter of the Application of BELT LINE RAILWAY CORPORATION for an Order Authorizing the Issue of Its Bonds and Stock and for the Approval of the Creation of a Mortgage

Order Consenting to Mortgage and Authorizing Issue of Stock and Bonds

Section 1. Application having been made to the Public Service Commission for the First District by Belt Line Railway Corporation by petition dated and verified December 24, 1912, and by supplemental petition dated and verified December 30, 1912, under the provisions of the Railroad Law, for the consent of the Commission to the execution and issuance by said company of a mortgage to Central Trust Company of New York, as Trustee, and a hearing having been duly held upon said application, and it appearing upon the said hearing that no capital stock of the said corporation has yet [fol. 38] been issued and that the authorized capital stock of the said corporation at the time of the making of the said application was $200,000, and that such authorized capitalization is proposed to be increased to $600,000;

Section 2. It is ordered that the Public Service Commission for the First District does hereby consent to the issuance and execution by said Belt Line Railway Corporation of a certain mortgage described as follows:

A mortgage executed by said Belt Line Railway Corporation unto Central Trust Company of New York, as Trustee, dated as of January 21, 1913, to secure an issue of $4,000,000 of first mortgage bonds of said Belt Line Railway Corporation, said bonds to be dated as of January 1, 1913, payable January 1, 1943, redeemable as an entirety at 105 per cent of the par or face value thereof and accrued interest on any interest day after notice as provided in said mortgage, said bonds to bear interest at 5 per cent per annum, payable semi-annually upon the terms and conditions in the said mortgage set forth and contained. The form of such mortgage submitted by said Belt Line Railway Corporation to the Commission is hereby approved and ordered filed and properly identified by a reference thereon to the resolution under authority of which this order is made. Said company, however, shall have no right or authority to issue any bonds pursuant to the terms of said mortgage except as herein or hereafter authorized by the Commission.

Section 3. Application having been also made to the Public Service Commission for the First District by said Belt Line Railway [fol. 39] Corporation by its said petitions under the provisions of the Public Service Commissions Law, for the consent of the Commission to the issuance by said company of bonds under said mortgage to the amount of $2,200,000 face value, and for the consent of the Commission to the issuance by said Belt Line Railway Corporation of $200,000 par value of stock of the said company; and a hearing having been duly had upon said application before the Commission and it being now the opinion of the Commission

(1) That the money to be procured by an issue of $1,750,000, face value of bonds of the said company, and by the issue of $431,300 par value of stock, is necessary to and reasonably required by said company for the acquisition of property or for the discharge or refunding of its obligations and particularly for the purposes which are hereinafter stated in this order; and

(2) That, except as to the following specified amounts of said bonds authorized to be issued hereunder to procure money for the purposes following, to wit: $87,500 or so much thereof as may be necessary to make up discount in the sale of the bonds hereby authorized, said purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Section 4. It is ordered that the Public Service Commission for the First District does hereby authorize the issue by the said Belt Line Railway Corporation of One Million Seven Hundred Fifty Thousand Dollars ($1,750,000), face value of principal of bonds of said company, dated January 1st, 1913, maturing January 1, 1943, redeem- [fol. 40] able at one hundred and five per cent (105%) of the face value thereof, besides accrued interest on any interest day and bearing interest at five per cent (5%) per annum, payable semi-annually, under and in pursuance of the terms of the mortgage hereinbefore described, the issuance and execution of which is by this order con-

sented to by this Commission, and it is further ordered that the Public Service Commission for the First District does hereby authorize the issue by the said Belt Line Railway Corporation of Four Hundred Thirty One Thousand Three Hundred Dollars ($431,300) par value of stock of said company.

Section 5. It is ordered that said issue of bonds and stock of the said Belt Line Railway Corporation is authorized upon the conditions following and not otherwise, to wit:

First. That said Belt Line Railway Corporation shall forthwith procure its authorized capital stock to be duly increased from $200,000 to $600,000; that said Belt Line Railway Corporation shall sell the said stock hereby authorized to be issued at not less than the par value thereof and shall sell the said bonds hereby authorized to be issued so as to net the said Belt Line Railway Corporation not less than ninety-five per cent (95%) of the face value thereof, besides accrued interest thereon;

Second. That the said Belt Line Railway Corporation shall apply the said bonds, or the proceeds thereof, to the amount of One Million Six Hundred Sixty Two Thousand Five Hundred Dollars ($1,662,500) face value, and said stock to the amount of Four Hundred [fol. 41] Thirty One Thousand Three Hundred Dollars ($431,300) par value, to the following purposes:

1. To purchase from Edward Cornell of the railroads, property, franchises and rights heretofore belonging to the Central Park, North and East River Railroad Company, and purchased by said Edward Cornell under decree of foreclosure and sale made February 16, 1911, by the Circuit Court of the United States for the Southern District of New York in an action entitled "The Farmers Loan and Trust Company, Complainant, against Central Park, North and East River Railroad Company and others, Defendants"...	$1,676,706.40
2. To the payment of taxes and liens upon the property so purchased to the amount of.....	397,406.27
3. To the discharge or refunding of obligations of the Belt Line Railway Corporation heretofore incurred and existing to the amount of.....	19,687.33
Total.....	$2,093,800.00

Third. That said Belt Line Railway Corporation shall apply said bonds, or the proceeds thereof, to the amount of Eighty-Seven Thousand Five Hundred Dollars ($87,500), face value, to make up the discount or deficiency, if any, in the amount realized upon the sale, to net not less than ninety-five per cent (95%) of par of the bonds applied to the amount of One Million Six Hundred Sixty-Two Thousand Five Hundred Dollars ($1,662,500), for the purposes in sub-

division Second of this section, to be applied pro rata for the purposes therein stated.

Fourth. That all discounts in connection with the sale of the said bonds and stock authorized to be issued under this order not to exceed Eighty-Seven Thousand Five Hundred Dollars ($87,500), shall be amortized out of the income of the company before the first day of January, 1943, by the payment of installments, so long as may be [fol. 42] necessary, of an amount not less than $2,916.67 annually in the manner provided in the mortgage hereby approved.

Fifth. That the said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or disposal of the stocks and bonds hereby authorized to be issued and on or before the 10th day of each month, the company shall make verified reports to the Commission stating the sale or sales of said stock and bonds during the previous month, the terms and conditions of sale, the moneys realized therefrom and the use and application of such moneys; and said accounts, vouchers and records shall be open to audit and may be audited from time to time by accountants and examiners designated for such purpose by the Commission. That within one month the company shall enter upon the books the money cost of the several classes of property in accordance with the rules, definitions and classification prescribed by this Commission in Schedule A of the Uniform System of Accounts for Street and Electric Railways.

Sixth. That on receipt by said Edward Cornell of the said bonds and stock of said Belt Line Railway Corporation, the said stock and bonds shall be disposed of by him to the Third Avenue Railway Company and that said Third Avenue Railway Company shall endorse upon each of the said bonds an assumption or guaranty agreement executed by the said Third Avenue Railway Company wherein and whereby said Third Avenue Railway Company shall guarantee or assume and agree with the holder thereof to pay the principal and interest of said bond according to the tenor thereof.

[fol. 43] Seventh. That the authority hereby given to issue such stock and bonds shall apply only to stock and bonds issued by the said company on or before the thirtieth day of June, 1913.

Eighth. That this order is without prejudice to any future application by the said Belt Line Railway Corporation for leave to issue capital stock to the amount of taxes and liens now existing upon the property so purchased and not paid by means of the bonds and stock herein authorized to be issued or the proceeds thereof.

Section 6. That a duplicate original of the mortgage consented to and authorized as aforesaid upon execution thereof be filed by the said Belt Line Railway Corporation with the Secretary of this Commission.

Section 7. It is further ordered that this order take effect immediately, and except as provided in sub-division Seventh of Sec-

tion 5, limiting the duration of the authority to issue such stock and bonds herein granted, continue in force until otherwise ordered by the Commission, and that within ten days after service upon it of a copy of this order, said company notify the Commission whether the terms of this order are accepted and will be obeyed.

By the Commission.

Travis H. Whitney, Secretary. (L. S.)

State of New York,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission [fol. 44] for the First District, do hereby certify, that I have compared the above with the original adopted by said Commission on March 19, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission, this 19th day of March, 1913.

Travis Whitney, Secretary. (Seal.)

[fol. 45] Exhibit C to Bill of Complaint

At a stated meeting of the Public Service Commission for the First District, duly held at its office, No. 154 Nassau Street, in the Borough of Manhattan, City and State of New York, on the 22nd day of July, 1913.

Present: Edward E. McCall, Chairman; Milo R. Maltbie, John E. Eustis, J. Sergeant Cram, George V. S. Williams, Commissioners.

Case No. 1703

In the Matter of the Application of the Belt Line Railway Corporation and the Third Avenue Railway Company for an Order Authorizing the Issue of Capital Stock by the Belt Line Railway Corporation to the Amount of Special Franchise Taxes for the Years 1910, 1911, and 1912 and for the Acquisition by the Third Avenue Railway Company of the Capital Stock so to be Issued.

Order Authorizing Issue of $49,700 Capital Stock and Acquisition Thereof by Third Avenue Railway Company

Section 1. The Belt Line Railway Corporation and the Third Avenue Railway Company by their petition dated and verified July 2, 1913 having applied to the Commission: the Belt Line Rail- [fol. 46] way Corporation for the consent of the Commission to the issuance by said Belt Line Railway Corporation of $49,700 par value of capital stock of said company, and the Third Avenue Rail-

way Company for the permission of the Commission to purchase and acquire the said stock to the amount of $49,700; and a hearing having been duly held upon said application before the Commission, Honorable Milo R. Maltbie, Commissioner, presiding, and it appearing on said application that said Belt Line Railway Corporation has by order of the Commission entered March 19, 1913, in Case No. 1606 been authorized to issue $1,750,000 face value of its first mortgage five per cent bonds and $431,300 par value of its capital stock and that said Third Avenue Railway Company has been authorized by the Commission by an order entered on the same day in Case No. 1620 to acquire said stock to the amount of $431,300 upon condition that said Third Avenue Railway Company shall at the same time purchase and acquire said bonds to the face amount of $1,750,000 and endorse upon each of said bonds before making any sale or other disposition thereof a guaranty or assumption to pay the principal and interest thereof as in said order provided.

Section 2. It being now the opinion of the Commission,

(1) That the money to be procured by an issue of $49,700 par value of stock of the said Belt Line Railway Corporation is necessary to and reasonably required by the said company for the acquisition of property or for the discharge or refunding of its obligations and particularly for the purposes which are hereinafter stated in this order; and

[fol. 47] (2) That said purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Section 3. It is ordered that the Public Service Commission for the First District does hereby authorize the issue by the said Belt Line Railway Corporation of Forty-nine thousand seven hundred dollars ($49,700) par value of stock of said company, and does hereby authorize the Third Avenue Railway Company to purchase, acquire, take and hold said $49,700 par value capital stock of the said Belt Line Railway Corporation upon condition that the said Third Avenue Railway Company shall, unless the same shall have been already acquired, at the same time purchase and acquire said $1,750,000 face value of first mortgage five per cent bonds of said Belt Line Railway Corporation and shall, unless the same shall have been already done, endorse upon each of said bonds before making any sale or other disposition thereof, a guaranty or an assumption agreement in substantially the following form:

For Value Received Third Avenue Railway Company hereby guarantees (or assumes) the within bond, and agrees with each and every holder thereof to pay the principal and interest of said bond according to the tenor thereof.

Dated, — ——, 1913.

Third Avenue Railway Co., by —— ——, President.

Attest: —— ——, Secretary.

Section 4. It is ordered that said issue of stock of the said Belt Line Railway Corporation and said acquisition thereof by the Third Avenue Railway Company is authorized upon the conditions following and not otherwise, to wit:

[fol. 48] First. That any of the said stock which it shall sell shall be sold by the said Belt Line Railway Corporation at not less than the par value thereof and that the said capital stock hereby authorized or the proceeds thereof shall be applied only to the following purposes, that is to say; toward the acquisition of the railroad, property franchises and rights heretofore belonging to the Central Park, North and East River Railroad Company, by payment of the special franchise taxes thereon for 1910, 1911 and 1912 with interest to January 1, 1913, such taxes and interest being liens upon said property, or by the payment of the debt of said Belt Line Railway Corporation to Edward Cornell or to the Third Avenue Railway Company incurred for the payment of said taxes and interest, $49,700.

Second: That the said Belt Line Railway Corporation shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or disposition of the stock hereby authorized to be issued and on or before the tenth day of each month shall make verified reports to the Commission stating the sale or sales of said stock during the previous month, the terms and conditions of sale, the moneys realized therefrom and the use and application of such moneys; and said accounts, vouchers and records shall be open to audit and may be audited from time to time by accountants and examiners designated for such purpose by the Commission.

Third. That the authority hereby given to issue such stock shall apply only to stock issued by the said company on or before the 30th day of September, 1913.

Section 5. It is further ordered that this order take effect immediately and, except as provided in subdivision Third of Section 4 [fol. 49] limiting the duration of the authority to issue said stock herein granted, continue in force until otherwise ordered by the Commission, and that within ten days after service upon them of a copy of this order, said Belt Line Railway Corporation and said Third Avenue Railway Company notify the Commission whether the terms of this order are accepted and will be obeyed.

By the Commission.

Travis H. Whitney, Secretary. (L. S.)

State of New York,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above with the original adopted by said Commission on July 22, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission, this 23rd day of October, 1914.

Travis Whitney, Secretary. (Seal.)

[fol. 50] EXHIBIT D TO BILL OF COMPLAINT

At a stated meeting of the Public Service Commission for the First District, duly held at its office, No. 154 Nassau Street, in the Borough of Manhattan, City and State of New York, on the 7th day of November, 1913.

Present: Milo R. Maltbie, Acting Chairman; John E. Eustis, J. Sergeant Cram, George V. S. Williams, Commissioners.

Case No. 1723

In the Matter of the Application of BELT LINE RAILWAY CORPORATION and the THIRD AVENUE RAILWAY COMPANY for an Order Authorizing the Increase of the Capital Stock of Belt Line Railway Corporation from $600,000 to $750,000, and Authorizing the Issue of Capital Stock of Belt Line Railway Corporation to Defray the Cost of Acquiring Storage-battery Cars and Authorizing the Acquisition by the Third Avenue Railway Company of the Capital Stock so to be Issued.

Order Authorizing Issue of $253,000 Capital Stock and Acquisition Thereof by Third Avenue Railway Company

Section 1. Belt Line Railway Corporation and Third Avenue [fol. 51] Railway Company by joint petition dated and verified August 6, 1913, having applied to the Commission: the Belt Line Railway Corporation for the consent of the Commission to the increase of its common capital stock from $600,000 to $750,000 and for the consent of the Commission to the issuance by it of $269,000 of the common capital stock as so increased to defray the cost of acquisition of 79 storage battery cars: the Third Avenue Railway Company for the permission of the Commission to the acquisition by the Third Avenue Railway Company of the said additional capital stock of Belt Line Railway Corporation, and a hearing having been duly held upon said application before Honorable Milo R. Maltbie, Commissioner, presiding, and it appearing that the Commission has consented to said increase of the capital stock of Belt Line Railway Corporation.

Section 2. It now being the opinion of the Commission (1) that the money to be procured by the issue of $253,000 par value of stock of the said Belt Line Railway Corporation is necessary to and reasonably required by the said company for the acquisition of property or for the discharge or refunding of its obligations and particularly for the purposes which are hereinafter stated in this

order and (2) that the said purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Section 3. It is ordered that the Public Service Commission for the First District does hereby authorize the issue by said Belt Line Railway Corporation of $253,000 par value of common capital stock of said company upon the conditions set forth in Section 4 below and does hereby authorize the Third Avenue Railway Company to [fol. 52] purchase, acquire, take and hold said $253,000 par value of the said common capital stock of said Belt Line Railway Corporation.

Section 4. It is ordered that Belt Line Railway Corporation be and hereby is authorized to issue its common capital stock upon the conditions following and not otherwise, to wit:

First. That the said stock be sold for cash at not less than the par value thereof.

Second. That the cash derived from the sale of said stock be applied

(1) For acquisition of thirty-nine storage battery cars with the necessary equipment thereof.....	$124, 909. 60
(2) For the discharge of indebtedness to Third Avenue Railway Company incurred for the acquisition of 40 Third Avenue type storage battery cars.....	$128, 090. 40
	$253, 000. 00

Third. That the said Belt Line Railway Corporation shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or disposal of the stock hereby authorized to be issued, and on or before the 10th day of each month shall make verified reports to the Commission stating the sale or sales of the said stock during the previous month, the terms and conditions of sale, the moneys realized therefrom and the use and application of such moneys; and said accounts, vouchers and records shall be open to audit and may be audited from time to time by accountants and examiners designated for such purpose by the Commission.

Fourth. That none of the proceeds of the aforementioned stock hereby authorized for the purposes specified in subdivision 1 of para- [fol. 53] graph second of Section 4 of this order, shall be expended by the said company for the purposes specified therein until a properly itemized bill for each proposed expenditure shall have been submitted to the Commission by the company with the certificate of one of its officers that such expenditure represents a real increase in its fixed capital as defined in the accounting rules of the Commission and not a replacement of any part of such fixed capital or a substitution for wasted capital or other loss properly chargeable to income, and until such bill shall have been approved by the Commission.

Fifth. That the authority hereby given to issue such stock shall apply only to stock issued by the said company on or before the 31st day of December, 1913.

Section 5. That the Belt Line Railway Corporation and Third Avenue Railway Company notify the Commission within 10 days after the receipt of a certified copy of this order whether the terms of this order are accepted and will be obeyed.

By the Commission.

Travis H. Whitney, Secretary. (L. S.)

County of New York,
State of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above with the original adopted by said Commision on November 7, 1913, and that it is a correct transcript therefrom and of the whole of the original.

[fol. 54] In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission, this 23rd day of October, 1914.

Travis Whitney, Secretary. (Seal.)

[fol. 55] Exhibit E to Bill of Complaint

Case No. 1778

In the Matter of the Application of the Third Avenue Railway Company for Leave to Issue $6,650,000 par Value of Its First Refunding Mortgage Fifty-year Four per Cent Gold Bonds Required by Its First Refunding Mortgage, Dated December 20, 1911

Order Authorizing Further Issue of $2,020,500 Face Value of Bonds—October 8, 1915

Section 1. Application having been made to the Public Service Commission for the First District by Third Avenue Railway Company by its petition dated and verified December 24, 1913, under the provisions of the Public Service Commission Law, for the consent of the Commission to the issuance by said company of $6,650,000 face value of its first refunding mortgage fifty year four per cent gold bonds under its first refunding mortgage dated December 20, 1911, and a hearing having been duly had upon said application before the Commission. Hon. Milo R. Maltbie, Commissioner, presiding at the beginning of said hearing and later Hon. George V. S. Williams, Commissioner, presiding, and the Commission having by a preliminary order made and filed herein February 20, 1914, authorized an issue of $4,000,000 face value of said bonds, the proceeds to be applied

as in said order set forth, and after further hearing it being now the opinion of the Commission:

(1) That the money to be procured by the issue of $2,020,500 face value of said bonds payable at a period of more than twelve months after the date thereof is necessary to and reasonably required by said company for the acquisition of property or for the construction, completion, extension or improvement of the facilities of said company [fol. 56] or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income or from other moneys in the treasury of said corporation, not secured by or obtained from the issue of stocks, bonds, notes or other evidences of indebtedness of such corporation for the acquisition of property or the construction, completion, extension or improvement of the facilities of said company, and particularly for the purposes which are hereinafter stated in this order; and

(2) That except as to the following specified amount of said bonds authorized to be issued hereunder to procure money for the purpose following, to wit:

$444,507.00, or so much thereof as may be necessary to pay expenses of sale of the bonds hereby authorized and to make up discount,

said purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Section 2. It is ordered, That the Public Service Commission for the First District does hereby authorize the issue by said Third Avenue Railway Company of Two million twenty thousand five hundred Dollars ($2,020,500) face value of principal of first refunding mortgage bonds of said company, dated January 1, 1910, maturing the first day of January, 1960, and redeemable at any time on or after the first day of January, 1915, at one hundred and five (105) per cent of the par or face value thereof besides accrued interest and to bear interest at four (4) per cent per annum, payable semi-annually, under and in pursuance of the terms of the said mortgage made and executed by the Third Avenue Railway Company to Central Trust Company of New York as Trustee, dated December 20, 1911.

Section 3. It is ordered, That said issue of bonds is authorized upon the conditions following and not otherwise, to wit:

First. That the said Third Avenue Railway Company shall sell the said bonds hereby authorized so as to net the said Company not less than seventy-eight per cent (78%) of the face value of the [fol. 57] amount thereof besides the interest accrued thereon, and that the proceeds thereof shall be applied only to the following purposes, that is to say:

1. To pay unpaid vouchers as of February 28, 1915, on account of fifty (50) low-step cars acquired by the said company $93,133.00
2. To pay for $25,000 par value of capital stock of Pelham Park and City Island Railway Company issued pursuant to the order of the Commission in Cases Nos. 1655, 1656..... 25,000.00
3. For reimbursement of the treasury of the Third Avenue Railway Company for expenditures out of income or other moneys in the treasury of said company not derived from stock, bonds, notes or other evidences of indebtedness of said company made for the purchase of the bonds and stock of New York City Interborough Railway Company and claims against said company over and above the sum of $1,000,000 authorized under order of February 20, 1914, in this proceeding..... 421,996.00
4. For reimbursement of the treasury of the Third Avenue Railway Company for expenditures out of income or other moneys in the treasury of said company not derived from stock, bonds, notes or other evidences of indebtedness of said company:
   (a) For acquisition of four hundred and fifty (450) shares of stock of the Pelham Park and City Island Railway Company..... 40,000.00
   (b) For acquisition of $20,000 par value of capital stock of Third Avenue Bridge Company at par..... 20,000.00
   (c) For acquisition of a certain note of the Third Avenue Bridge Company dated July 1, 1914, face value 92,908.64
   (d) For acquisition of property and for construction, completion, extension or improvement of the facilities of said Third Avenue Railway Company between January 1, 1912, and February 28, 1915..... 413,919.83

[fol. 58] 5. For reimbursement of the treasury of the Third Avenue Railway Company for expenditures between January 1, 1912, and February 28, 1915, out of income or other moneys in the treasury of said company not derived from stock, bonds, notes, or other evidences of indebtedness of said company upon lines of controlled companies of the said Third Avenue Railway Company hereinafter mentioned, said expenditures to be evidenced by demand notes of the said companies respectively, for the amounts following, to the extent that the sum of said expenditures constitute a net addition and improvement of the properties..... 451,022.51

Belt Line Railway Corporation....	$73,091.53
Bronx Traction Company.....	131,067.61
42nd Street, Manhattanville and St. Nicholas Avenue Railway Company	23,185.54
New York, Westchester and Connecticut Traction Company.....	24,047.54
Southern Boulevard Railroad Company	64,013.97
Westchester Electric Railroad Company	153,536.36
Yonkers Railroad Company.....	200,683.35
	$669,625.90
From which deduct a credit figure for the Union Railway Company of	225,961.58
	$443,664.32
New York City Interborough Railway Company	7,358.29
	$451,022.61

6. For the expenses of sale of the bonds hereby authorized and to make up the discount or deficiency, if any, in the amount realized upon the sale to net not less than seventy-eight per cent (78%) of par of the bonds sold for the purposes specified in subdivisions 1, 2, 3, 4, and 5 of this paragraph of this section to be [fol. 59] applied pro rata for the purposes therein stated not exceeding the sum of..... 444,507.00

$2,002,487.08

Second. That for the said expenditures each of the said controlled companies shall give to the Third Avenue Railway Company a demand non-negotiable promissory note for the amount of the expenditure upon its lines stated above.

Third. That in order to provide for the amortization of expenditures made since January 1, 1912, under franchises granted for limited terms, for construction and improvement upon lines of the Union Railway Company amounting to $144,501 and of Bronx Traction Company amounting to $62,853 and of Southern Boulevard Railroad Company amounting to $12,240 the said companies shall severally establish and maintain amortization funds and before paying interest on their indebtedness or declaring or paying any dividends on their capital stock each of the said companies shall pay in cash into the said fund of such company out of the income of such company in each year beginning July 1, 1915, the following sums of money, to wit:

Union Railway Company	$2,197.00
Bronx Traction Company	786.00
Southern Boulevard Railroad Co	159.00

plus 4½ per cent upon all its prior payments until in the case of each company its said fund shall amount to the expenditures aforesaid upon the lines of said companies, respectively. The said funds in the case of each of the said companies shall be used only for the acquisition of property for capital or investment purposes or the discharge of obligations of the said company, the payment of which is approved by the Commission.

Fourth. That all of the said bonds issued under the authority of this order for the payment of expenses and discount in connection with the approval, issuance and sale of the bonds hereby authorized not to exceed $444,507 shall be amortized, and for such amortization the said Third Avenue Railway Company shall establish and maintain an amortization fund and shall pay in cash into said fund out of [fol. 60] revenue or surplus of said company, on the 30th day of June, 1916, and on the 30th day of June in each year thereafter until the 30th day of June, 1959, an amount of money which shall not be less than seventy-six one hundredths of one per cent of the said bonds issued to pay said expenses and discount plus four and one-half per cent (4½%) per annum upon all prior payments into said fund or until said fund with accumulations shall have aggregated Four hundred and forty-four thousand five hundred and seven Dollars ($444,507) or the amount of said bonds issue to pay said expenses and discount, and said fund shall be used only for the purpose of retirement of mortgage bonds of said company or for other purposes approved by the Commission.

Fifth. That said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or disposal of the bonds hereby authorized to be issued, and on or before the 10th day of each month the company shall make verified reports to the Commission stating the sale or sales of said bonds during the previous month, the terms and conditions of sale, the moneys realized therefrom, and the use and application of such moneys; and said accounts, vouchers and records shall be open to audit and may be audited from time to time by accountants and examiners designated for such purpose by the Commission.

Sixth. That the authority hereby given to issue such bonds shall apply only to bonds issued by the said company on or before the 30th day of June, 1916.

Section 4. Further ordered, That this order take effect on the 8th day of October, 1915, and, except as provided in the sixth paragraph of Section 3 limiting the duration of the authority to issue said bonds hereby granted, continue in force until otherwise ordered by the Commission, and that within ten (10 days after service upon it of a copy of this order the said company notify the Commission whether the terms of this order are accepted and will be obeyed.

[fol. 61]

Exhibit F to Bill of Complaint

Belt Line Railway Corporation

Income from Operations, Year Ended June 30th, 1918

Revenues:

			Per passenger
Passenger Revenue:			
6,450,687 Passengers at 5¢ each	$322,534.35		5.00¢
13,512,033 " at 2¢ "	270,240.66		2.00¢
771,367 Free Transfers (not covered by Joint Rate)	.....		
20,734,087 Total Passengers		$592,775.01	
Chartered Cars		20.00	
Advertising		10,879.00	
Rent of Buildings and Other Property		20,474.99	
Rent of Tracks and Terminals		2,250.00	
Rent of Equipment		4,749.00	
Total Revenues		$631,148.00	

Operating Expenses, Taxes, etc. (Not Including Any Allowance for Depreciation):

Maintenance of Way and Structures	$73,028.79	.35¢
Maintenance of Equipment	53,164.57	.26¢
Power Supply	91,191.95	.44¢
Operation of Cars	205,726.92	.99¢

Injuries to Persons and Property		37,469.74	.18¢
General and Miscellaneous Expenses		26,293.99	.13¢
Hire of Equipment		39,786.05	.19¢
Taxes		44,256.68	.21¢
Total Operating Expenses and Taxes (but not including any allowance for depreciation)		$570,918.69	2.75¢

Capitalization Approved by Public Service Commission, 1st Dist.:

Capital Stock	$734,000.00		
First Mortgage 5% Bonds	1,750,000.00		
Notes Payable—5%	73,091.53		
	$2,557,091.53		
Interest on First Mortgage Bonds		$87,500.00	.42¢
Interest on Notes Paya le		3,654.60	.02¢
Amortization of Bond Discount		2,916.60	.01¢
Total Operating Expenses and Fixed Charges (But Not Including Any Allowance for Depreciation)		$664,989.89	3.20¢
Balance—Available for Depreciation and for Return on $734,000.00 Capital Stock —(Deficit)		$33,841.89*†	

*Does not include interest earnings amounting to $1,952.38, on deposits made by the Company.
[†Red in copy.]

[fol. 62]

Exhibit G to Bill of Complaint

Belt Line Railway Corporation

Income from Operations, Year Ended June 30th, 1919

Revenues:

			Per passenger
Passenger Revenue:			
5,440,766 Passengers at 5¢ each	$272,038.30		5.00¢
12,817,674 " at 2¢ each	256,353.48		2.00¢
407,375 Free Transfers (not covered by Joint Rate)	.....		
18,665,815 Total Passengers		$528,391.78	
Chartered Cars		10.00	
Advertising		8,600.00	
Rent of Buildings and Other Property		21,449.61	
Rent of Tracks and Terminals		2,250.00	
Rent of Equipment		3,018.00	
Total Revenues		$563,719.39	

Operating Expenses, Taxes, etc. (Not Including Any Allowance for Depreciation):

Maintenance of Way and Structures	$45,692.71	.24¢
Maintenance of Equipment	45,443.33	.24¢
Power Supply	49,237.43	.26¢

Operation of Cars		176,971.71	.95¢
Injuries to Persons and Property		44,647.43	.24¢
General and Miscellaneous Expenses		27,517.71	.15¢
Hire of Equipment		32,725.00	.18¢
Taxes		42,983.92	.23¢
Total Operating Expenses and Taxes (but not including any allowance for depreciation)		$465,219.24	2.49¢
Capitalization Approved by Public Service Commission, 1st Dist.:			
Capital Stock	$734,000.00		
First Mortgage 5% Bonds	1,750,000.00		
Notes Payable—5%	73,091.53		
	$2,557,091.53		
Interest on First Mortgage Bonds		$87,500.00	.47¢
Interest on Notes Paya le		3,654.60	.02¢
Amortization of Bond Discount		2,916.60	.02¢
Total Operating Expenses and Fixed Charges (But Not Including Any Allowance for Depreciation)		$559,290.44	3.00¢
Balance—Available for Depreciation and for Return on $734,000.00 Capital Stock.		$4,428.95*	

*Does not include interest earnings amounting to $2,730.16 on deposits made by the Company.

Exhibit H to Bill of Complaint

Belt Line Railway Corporation

Income from Operations, Year Ended June 30th, 1920

			Per passenger
Revenues:			
Passenger Revenue:			
7,186,735 Passengers at 5¢ each	$359,336.75		5.00¢
10,171,479 " at 2¢ "	203,429.58		2.00¢
531,876 Free Transfers (not covered by Joint Rate)	.....		
17,890,090 Total Passengers		$562,766.33	
Advertising		8,801.12	
Rent of Buildings and Other Property		21,183.33	
Rent of Tracks and Terminals		1,000.00	
Rent of Equipment		200.00	
Total Revenues		$593,950.78	
Operating Expenses, Taxes, etc. (Not Including Any Allowance for Depreciation):			
Maintenance of Way and Structures		$83,889.41	.47¢
Maintenance of Equipment		53,134.45	.30¢
Power Supply		51,318.97	.29¢
Operation of Cars		202,813.66	1.13¢

Injuries to Persons and Property		36,320.45	.20¢
General and Miscellaneous Expenses		23,603.85	.13¢
Taxes		42,553.73	.24¢
Hire of Equipment		30,561.00	.17¢
Total Operating Expenses and Taxes (but not including any allowance for depreciation)		$524,295.52	2.93¢

Capitalization Approved by Public Service Commission, 1st Dist.:

Capital Stock	$734,000.00		
First Mortgage 5% Bonds	1,750,000.00		
Notes Payable—5%	73,091.53		
	$2,557,091.53		
Interest on First Mortgage Bonds		87,500.00	.51¢
Interest on Notes Payable		3,654.60	....
Amortization of Bond Discount		2,916.60	.02¢
Total Operating Expenses and Fixed Charges (But Not Including Any Allowance for Depreciation)		$618,366.72	3.46¢
Balance—Available for Depreciation and for Return on $734,000.00 Capital Stock (Deficit)		$24,415.94*†	

*Does not include interest earnings amounting to $3,601.12, on deposits made by the Company.
[†Red in copy.]

Exhibit I to Bill of Complaint

Belt Line Railway Corporation

Income from Operations, Period of 4 Months Ended October 31, 1920

			Per passenger
Revenues:			
Passenger Revenue:			
2,402,202 Passengers at 5¢ each	$120,101.00		5.00¢
3,077,007 " at 2¢ "	61,540.14		2.00¢
109,094 Free Transfers (not covered by Joint Rate)	.....		
5,588,121 Total Passengers		$181,641.14	
Advertising		3,000.76	
Rent of Buildings and Other Property		8,033.33	
Rent of Tracks and Terminals		250.00	
Total Revenues		$192,925.23	
Operating Expenses, Taxes, etc. (Not Including Any Allowance for Depreciation):			
Maintenance of Way and Structures		$31,949.00	.57¢
Maintenance of Equipment		19,358.95	.35¢
Power Supply		21,650.25	.39¢
Operation of Cars		71,783.13	1.28¢
Injuries to Persons and Property		12,714.87	.23¢
General and Miscellaneous Expenses		9,006.49	.16¢

CHART

TOO

LARGE

FOR

FILMING

Hire of Equipment		10,042.50	.18¢
Taxes		13,678.85	.24¢
Total Operating Expenses and Taxes (but not including any allowance for depreciation		$190,184.04	3.40¢
Capitalization Approved by Public Service Commission, 1st Dist.:			
Capital Stock	$734,000.00		
First Mortgage 5% Bonds	1,750,000.00		
Notes Payable—5%	73,091.53		
	$2,557,091.53		
Interest on First Mortgage Bonds		$29,166.66	.52¢
Interest on Notes Payable		1,218.20	.02¢
Amortization of Bond Discount		972.00	.02¢
Total Operating Expenses and Fixed Charges (But Not Including Any Allowance for Depreciation)		$221,541.10	3.96¢
Balance—Available for Depreciation and for Return on $734,000.00—Capital Stock (Deficit)		$28,615.87*†	

*Does not include interest earnings amounting to $495.60, on deposits made by the Company.
[†Red in copy.]

(Here follows Exhibit J to Bill of Complaint, marked side folio page 65.)

[fol. 66] EXHIBIT K TO BILL OF COMPLAINT

Before the Public Service Commission of the State of New York for the First District, No. 49 Lafayette Street, Borough of Manhattan, New York City, 9th Day of July, 1920

Present: Hon. Alfred M. Barrett, Deputy and Acting Commissioner.

Case No. 1364

In the Matter of the Hearing on the Motion of the Commission as to Rates of Fare Upon Connecting or Intersecting Lines of Street Railroad in the Borough of Manhattan, City of New York

Order "A"

The Commission having by order under date of October 29, 1912, in the above entitled proceeding established, among other things, certain through routes composed of lines of the New York Railways Company, the Central Park, North and East River Railroad Company and the Second Avenue Railroad Company in the City of New York, and having fixed the sum of five cents as the maximum joint rate, fare or charge to be exacted for transportation over the said through routes, and Job E. Hedges, as Receiver of the New York Railways Company, by petition duly verified the 11th day of May, 1920, and the Belt Line Railway Corporation as successor to the Central Park, North and East River Railroad Company by petition duly verified the 18th day of May, 1920, having made application to the Commission for permission to discontinue the exchange of transfers between the New York Railways Company, the Central [fol. 67] Park, North and East River Railroad Company and the Second Avenue Railroad Company in the City of New York required by said order of the Commission under date of October 29, 1912 and hearings having been held by and before the Commission upon the said application on May 27, 1920, and certain days thereafter. John A Mullen, Assistant Counsel, appearing for the Commission, Job E. Hedges as Receiver of the New York Railways Company appearing by Winthrop & Stimson, Esqs., Allen T. Klotz of counsel the Belt Line Railway Corporation appearing by Alfred T. Davidson, Esq., in support of said application and The City of New York, by M. Maldwin Fertig, Esq., Assistant Corporation Counsel appearing in opposition to said application, and the Commission after a careful consideration of the testimony and briefs submitted by counsel, being of the opinion that the convenience of the travelling public necessitates the continuance of the said transfers, but that the maximum joint rate of five cents fixed in the said order of October 29, 1920, is, by reason of the changed conditions under which the said railroad companies are operating, unjust, unreasonable, and insufficient to render a fair and reasonable return for the service furnished, it is

Ordered

(1) That the maximum joint rate, fare or charge to be exacted for through transportation over any through route established by said order of October 29, 1912, which through route involves a transfer by a passenger from the lines of one to another of the following companies, the New York Railways Company, the Central Park, North and East River Railroad Company and the Second Avenue Railroad [fol. 68] Company in the City of New York, be and the same hereby is fixed, commencing September 13, 1920, at the sum of seven cents instead of five cents.

(2) That the New York Railways Company and Job E. Hedges, its Receiver, the Belt Line Railway Corporation, as successor to the Central Park, North and East River Railroad Company, and the Second Avenue Railroad Company in the City of New York and Charles E. Chalmers, its Receiver, be and they hereby are required to make within thirty days from and after September 13, 1920, agreements as to the portion of each of the joint rates, fares or charges to which each of them shall be entitled and to notify the Commission on or before November 1, 1920 whether any such agreements have been entered into and what the terms of such agreements may be.

(3) That nothing contained in this order shall be construed to modify or amend the said order of October 29, 1912, except to increase from five cents to seven cents the maximum joint rates over the through routes herein mentioned.

(4) That not later than September 11, 1920 the New York Railways Company and Job E. Hedges, its Receiver, the Belt Line Railway Corporation, as successor to the Central Park, North and East River Railroad Company, and the Second Avenue Railroad Company in the City of New York and Charles E. Chalmers, its Receiver, shall file with the Commission new, supplemental or amended schedules showing the changes in their existing schedules herein indicated.

(5) That "First revised pages Nos 2 and 3 and Second revised page No. 9 of the Belt Line Railway Corporation Tariff" filed with this Commission under date of May 24, 1920, be and the same [fol. 69] hereby are annulled.

(6) That this order shall take effect immediately and remain in force until modified or abrogated by further order of the Commission.

(7) That not later than September 1, 1920 the New York Railways Company, and Job E. Hedges, its Receiver, the Belt Line Railway Corporation, and the Second Avenue Railroad Company in the City of New York and Charles E. Chalmers, its Receiver, shall notify the Commission in writing whether the terms of this order are accepted and will be obeyed.

By the Commission.

James B. Walker, Secretary. (L. S.)

STATE OF NEW YORK,
County of New York, ss:

I, James B. Walker, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above with the original approved by said Commission on July 9, 1920, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission, this 20th day of July, 1920.

James B. Walker, Secretary.

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT PUBLIC SERVICE COMMISSION

The defendant, Alfred M. Barrett, constituting the Public Service Commission of the State of New York for the First District for his answer to the Bill of Complaint herein respectfully shows to this Court and alleges:

(I) Admits each and every allegation contained in the paragraphs of the Bill of Complaint, marked or numbered I and II.

II. Admits each and every allegation contained in that paragraph of the Complaint, marked or numbered III, except that he denies knowledge or information thereof sufficient to form a belief as to the allegation in folio 8 of said paragraph III that "such operation results in a loss to the Drydock East Broadway and Battery Railroad Company, but such losses are not included in the losses of your orator set forth herein."

III. Admits each and every allegation contained in paragraphs of the Bill of Complaint, marked and numbered IV, V and VI.

IV. Admits each and every allegation contained in that paragraph of the Bill of Complaint, marked or numbered VII except that he [fol. 71] denies knowledge or information thereof sufficient to form a belief as to the allegation contained in folio 21 of said paragraph that "with the exception of the foregoing changes approved by the Public Service Commission of the State of New York for the First District, your orator has during the entire time it has operated its street railroad complied and is now complying with the said order of October 29, 1912."

V. Admits each and every allegation contained in that paragraph of the Bill of Complaint, marked or numbered VIII, except that he denies knowledge or information thereof sufficient to form a belief

as to the allegations contained in folio 21 of said paragraph that "the outstanding capital stock, first mortgage bonds and note payable of your orator, represent * * * the fair and reasonable market value of the property of your orator."

VI. Admits each and every allegation contained in that paragraph of the Bill of Complaint, marked or numbered IX, except that he denies knowledge or information thereof sufficient to form a belief as to the allegation contained in folio 28 of said paragraph IX that "your orator has complied with and conformed in all respects to the said system of accounts, as prescribed by the Public Service Commission of the State of New York for the First District, and has kept its books and reports, including operating details, in full compliance with the directions of the said Public Service Commission of the State of New York for the First District," and also denies knowledge or information thereof sufficient to form a belief as to the allegation [fol. 72] contained in folios 29-30 of said paragraph IX that "the receipts and expenditures of your orator, and full information regarding the street railroad operations and business of your orator have been and are from time to time furnished to the said Public Service Commission of the State of New York for the First District, as directed or desired by it."

VII. Denies knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraphs of the Bill of Complaint, marked or numbered X and XI.

VIII. Admits each and every allegation contained in that paragraph of the Bill of Complaint, marked or numbered XII, except that he denies that the Public Service of the State of New York for the First District has "refused" for more than thirty days to determine the matters submitted to it on such rehearing and denies that the neglect of the Public Service Commssion of the State of New York for the First District to determine matters submitted on such rehearing is "contrary to and in violation of the provisions of Section 22 of said Public Service Commission Law of the State of New York," as alleged in folio 45 of said paragraph XII, and further denies each and every allegation contained in folios 46 and 47 of said paragraph XII of the Bill of Complaint.

IX. Denies each and every allegation contained in that paragraph in the Bill of Complaint, marked or numbered XIII.

X. Denies knowledge or information thereof sufficient to form a belief as to the allegations contained in folios 49, 50 and 51 of that paragraph of the Bill of Complaint, marked or numbered XIV [fol. 73] through line 4 of said folio 51 of said paragraph 14 and denies each and every allegation contained in the remainder of that paragraph of the Bill of Complaint, marked or numbered XIV, except that defendant denies knowledge or information thereof sufficient to form a belief as to the allegation contained in folio 51 of said paragraph XIV that "your orator is advised by counsel."

XI. Denies knowledge or information thereof sufficient to form a belief as to the allegations contained in paragraphs of the Bill of Complaint, marked or numbered XV, XVI and XVII.

Said Alfred M. Barrett, constituting the Public Service Commission of the State of New York for the First District, further answering the bill of complaint herein, and for a first separate and distinct defense to complainant's alleged cause of action, alleges:

XII. Upon information and belief, that complainant has an adequate remedy at law by procuring a writ of mandamus compelling this defendant to make a determination in respect of the matters submitted to it on the rehearing of the application of the Belt Line Railway Company for a modification of the order of October 29, 1912, and by reviewing on a writ of certiorari in the Appellate Division of the Supreme Court of the State of New York, said determination of this defendant if it is unsatisfactory; and that complainant has a further adequate remedy at law by making application to this defendant under Section 49, subdivision 1 of the Public Service Commissions Law of the State of New York, for a general increase in fare over its entire line.

XIII. Upon information and belief that the complainant has not availed itself of either of the adequate legal remedies set forth in the preceding paragraph and that complainant cannot maintain this [fol. 74] action in equity by reason of such facts.

Wherefore this defendant demands judgment dismissing the Bill of Complaint herein, with costs.

Alfred M. Barrett, Constituting the Public Service Commission of the State of New York for the First District. Terence Farley, Solicitor for Defendant, Public Service Commission, 49 Lafayette Street, Borough of Manhattan, City of New York.

[fol. 75] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT EDWARD SWANN, AS DISTRICT ATTORNEY

The District Attorney of the County of New York, State of New York, by John P. O'Brien, his solicitor herein, alleges:

First. Your orator denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in the paragraphs of the Bill of Complaint marked and numbered "I," "II" and "III," except that your orator admits that complainant is a street railroad corporation, duly incorporated, organized and doing business under the Railroad Law of the State of New York, being Chapter 49 of the Consolidated Laws of the State of New York, and is now operating a street surface railroad over and

along 59th Street, between First Avenue and Tenth Avenue, and over and along Tenth Avenue from Fifty-ninth Street to West Street, at or near West 12th Street, and over and along West Street, from about West 12th Street to the Battery.

Second. Upon information and belief your orator denies each and every allegation contained in paragraph or subdivision numbered [fol. 76] and marked "VII" of complainant's Bill of Complaint herein, except that he admits that on or about the 29th day of October, 1912, the Public Service Commission of the State of New York for the First District, made an order establishing through routes for continuous trips in the same general direction and fixing a joint rate fare and charge of five cents for the transportation of passengers over such through routes between the line of complainant on Fifty-ninth Street and the lines of the other street surface railroads in New York City, running north and south and intersecting complainant's line.

Third. Your orator denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs marked and numbered "VIII," "IX," "X" and "XI" of complainant's Bill of Complaint herein, except that he admits that in and by the Public Service Commissions Law, being Chapter 48 of the Consolidated Laws of the State of New York, every street railroad corporation including complainant, is required to file with the Public Service Commission, certain annual and other prescribed reports and keep their books and records in conformity with the uniform system of accounts established by the Public Service Commission.

Fourth. Upon information and belief your orator denies each and every allegation contained in the paragraph of the Bill of Complaint marked and numbered "XII," except that he admits that on or about the 18th day of May, 1920, complainant filed with the Public Service Commission of the State of New York for the First District a petition praying for the modification of the order of October 29. [fol. 77] 1912, and that commencing with May 27, 1920, and continuing until and including June 14, 1920, hearings were held pursuant to said petition, and that on or about the 9th day of July, 1920, the said Public Service Commission of the State of New York for the First District, made an order, wherein and whereby the maximum joint rate, fare or charge to be exacted for through transportation over any through route established by its order of October 29, 1912, should be, and the same thereafter was, fixed at the sum of seven cents, instead of five cents. Your orator further admits that on or about the 23rd day of July, 1920, complainant applied to the Public Service Commission of the State of New York for the First District for a rehearing in respect of the matters determined in and by said order of July 9, 1920, and on the 4th day of November, 1920, the said Public Service Commission of the State of New York for the First District made an order granting a rehearing, and accordingly hearings were held by the Public Service Commission of the

State of New York for the First District, pursuant to said order granting a rehearing, and on or about the 10th day of November, 1920, the case was closed.

Fifth. Upon information and belief your orator denies each and every allegation in the paragraphs of the Bill of Complaint herein marked and numbered "XIII," "XIV" and "XV."

Sixth. Your orator denies that he had any knowledge or information sufficient to form a belief as to each and every allegation in the paragraph of the Bill of Complaint herein marked and numbered "XVI."

Seventh. Upon information and belief your orator alleges that all and every of the matters in said complainant's Bill of Complaint are matters which may be tried and determined at law or by peti- [fol. 78] tion in courts of competent jurisdiction in the State of New York, and complainant is not entitled to any relief in a court of equity in respect to any of said matters.

Eighth. Upon information and belief your orator avers that the order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912, is no longer in existence or in force or effect, but that said order was superseded by the order of the Public Service Commission of the State of New York for the First District, dated July 9, 1920, which is now in full force and effect, and from which, if aggrieved, complainant has adequate remedy at law.

Ninth. Upon information and belief your orator avers that the joint rate, fare or charge provided for in the order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912, is reasonable and not confiscatory and would not deprive complainant of its property without due process of law, does not deny it the equal protection of the law, is not in violation of Section 10 of Article I of the Constitution of the United States, and does not deprive complainant of the liberty of contract.

Tenth. Upon information and belief your orator denies that the joint rate, fare or charge fixed by the order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912, is unreasonable and unjust and cannot be continued in effect without irreparable injury to the complainant or the destruction or denial of its property rights and interests or any of them.

[fol. 79] Eleventh. Upon information and belief, your orator alleges that all and every of the matters in said complainant's Bill of Complaint are matters which may be tried and determined at law in the courts of the State of New York or by petition directed to the Legislature of the State of New York and with respect to which the said complainant is not entitled to any relief in a court of equity.

Twelfth. Upon information and belief your orator alleges that in the proceedings held before the Public Service Commission of the State of New York for the First District, resulting in the order of October 29, 1912 and the order of July 9, 1920, the City of New York appeared as a party and participated therein and that the City of New York is, therefore, a proper and necessary party in this action in order that the matter may be fully determined and the rights and interests of all parties concerned properly and fully decided.

Wherefore your orator prays that the said Bill of Complaint be dismissed with costs.

John P. O'Brien, Corporation Counsel of the City of New York, Solicitor for Defendant Edward Swann.

Office and Post Office Address: Municipal Building, Borough of Manhattan, New York City.

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

The application of the complainant for the issuance of an interlocutory injunction in this action having been presented to me, and the papers submitted in behalf of the application having been filed herein,

It is ordered that the said application be heard before the court constituted in the manner prescribed by Section 266 of the Judicial Code of the United States, on the 30 day of December, 1920, at 10.30 o'clock in the forenoon of that day, at Room 235, in the Courthouse in the Post Office Building, Park Row and Broadway, in the Borough of Manhattan, in the City County and State of New York; and that the defendants, and each of them, at such time and place, show cause why an order should not be made herein, enjoining and restraining, pending the final judgment of this action, and until the further order of this court, the defendants, and each of them, and their, and each of their, officers, agents, servants and employes, and any and every person acting under and by virtue of the authority of the order of the Public Service Commission of the State of New York for the First [fol. 81] District, dated October 29th, 1912, and the Public Service Commissions Law of the State of New York, and any other law of the State of New York, in so far as any of said laws relates or provides for the enforcement of said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, from in any way enforcing or attempting to enforce the provisions of said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, against the Complainant herein (excepting in so far as said order provides for joint rates, fares and charges between the lines of said Complainant

and the lines of the Third Avenue Railway Company, and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company), and from bringing any action thereon to enforce any penalties against said Complainant, and from bringing any action or proceeding in mandamus or for an injunction in any court whatsoever, for the purpose of compelling compliance by said Complainant with the said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912 (excepting in so far as said order provides for joint rates, fares and charges between the lines of the said Complainant and the lines of the Third Avenue Railway Company, and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company); and from doing any act or thing interfering with the right or authority of the Complainant forthwith to discontinue the carrying out of the provisions of the order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, (excepting in so far as said order provides for joint rates, fares and charges between the lines of the Complainant and the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville & St. Nicholas Avenue [fol. 82] Railway Company); and from doing any act or thing interfering with the right or authority of the Complainant forthwith, to exact and charge or receive for transportation upon its lines, the same rates and fares which it might lawfully exact and charge, if the provisions of the said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, relative to the rate to be exacted or charged by the Complainant, were not operative (excepting only as to passengers transferring to or from the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company); and for such other and further relief as to the Court may seem just and proper in the premises; and it is further

Ordered that a copy of this order be served at least five days before the date hereinbefore mentioned, upon the Honorable Alfred E. Smith, the Governor of the State of New York, and upon the Honorable Charles D. Newton, the Attorney General of the State of New York, and upon all other defendants in this suit.

Dated December 16, 1920.

Julius M. Mayer, United States District Judge.

[fol. 83] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF INJUNCTION

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Upon the Bill of Complaint herein, and upon the annexed affidavits of Edward A. Maher, Jr., and Bernard G. Steinetz, each veri-

fied the 14th day of December, 1920, and upon the proceedings had herein, the Belt Line Railway Corporation, the Complainant above named, makes application to your Honors for a Writ of Injunction, enjoining and restraining, pending the final judgment in this action, and until the further order of this Court, the defendants and each of them, and their and each of their, officers, agents, servants and employes, and any and every person acting under and by virtue of the authority of the order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, and the Public Service Commissions Law of the State of New York, and any other law of the State of New York, in so far as any of said laws relates or provides for the enforcement of said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, from in any way enforcing or attempt- [fol. 84] ing to enforce the provisions of said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, against the Complainant herein (excepting in so far as said order provides for joint rates, fares and charges between the lines of said Complainant and the lines of the Third Avenue Railway Company, and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company), and from bringing any action thereon to enforce any penalties against said Complainant, and from bringing any action or proceeding in mandamus or for an injunction in any court whatsoever, for the purpose of compelling compliance by said Complainant with the said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, (excepting in so far as said order provides for joint rates, fares and charges between the lines of the said Complainant and the lines of the Third Avenue Railway Company, and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company); and from doing any act or thing interfering with the right or authority of the Complainant forthwith to discontinue the carrying out of the provisions of the order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, (excepting in so far as said order provides for joint rates, fares and charges between the lines of the Complainant and the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company); and from doing any act or thing interfering with the right or authority of the Complainant forthwith, to exact and charge or receive for transportation upon its lines, the same rates and fares which it might lawfully exact and charge, if the provisions of the said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, relative [fol. 85] to the rate to be exacted or charged by the Complainant, were not operative (excepting only as to passengers transferring to or from the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company); and the Complainant prays your Honors to call to your Honors' assistance, to hear and determine this application, two other

Judges in accordance with the provisions of Section 266 of the Judicial Code, and to expedite the hearing of this application, and set the same down for hearing at the earliest practicable date; and for such other and further relief, as to the Court may seem just and proper in the premises.

Dated New York, N. Y., December 14, 1920.

Alfred T. Davison, Solicitor for Complainant.

Office and Post Office address, 2396 Third Avenue, New York City, N. Y.

[fol. 86] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EDWARD A. MAHER, JR.

Edward A. Maher, Jr., being duly sworn, deposes and says:

During the years 1914 to 1916 inclusive I was Assistant General Manager of the Belt Line Railway Corporation; during the years 1917 to 1919 inclusive I was Vice President and General Manager of said Belt Line Railway Corporation, and I am now associated with the Legal Department of the Third Avenue Railway System, which includes said Belt Line Railway Corporation. In my capacity as Assistant General Manager, General Manager and Vice President of said Belt Line Railway Corporation, I became familiar with the street railroad operation not only of said Belt Line Railway Corporation but also with the operation of other street railroad companies in the Borough of Manhattan, City of New York, and from the records of said Belt Line Railway Corporation and the records of the other companies in the Third Avenue Railway System, of which I was also successively Assistant General Manager, General Manager and Vice President during the years hereinbefore referred to, I became [fol. 87] familiar with the history of the operation of all the street railroads in the Borough of Manhattan, City of New York.

I have read the bill of complaint herein, verified by S. W. Huff, on December 14, 1920, and all the facts therein stated are true to my own knowledge.

Fifty-ninth Street in the Borough of Manhattan, City of New York, runs east and west across said Borough extending from the East River to the North River. Said 59th Street is intersected by avenues running north and south, said intersecting avenues in their order from east to west being as follows: Avenue A, First Avenue, Second Avenue, Third Avenue, Lexington Avenue, Park Avenue, Madison Avenue, Fifth Avenue, Sixth Avenue, Seventh Avenue, Eighth Avenue, Broadway, Columbus or Ninth Avenue, Amsterdam or Tenth Avenue, West End or Eleventh Avenue, Twelvth Avenue.

On said 59th Street there is located the double track street railroad

of the Belt Line Railway Corporation, operated by an underground slot conduit system of electricity, extending from First Avenue to Tenth Avenue. The easterly end of said street railroad on 59th Street is connected with a railroad on First Avenue extending from 59th Street to 14th Street, owned by said Belt Line Railway Corporation, and operated at the present time under trackage agreement, by The Dry Dock, East Broadway and Battery Railroad Company. This line is operated by storage battery cars, and is operated by said Dry Dock Company as a part of its Avenue B line which also extends south of 14th Street. The westerly end of the street railroad on 59th Street is connected with a street railroad on Tenth Avenue extending from 59th Street to West 12th Street and thence along West Street to the Battery, which said railroad is owned and operated by the Belt Line Railway Corporation except between 42nd and 59th Streets *Streets* where the road is operated by The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company.

[fol. 88] The street railroad on 59th Street is crossed by a street railroad located on Third Avenue, operated by the Third Avenue Railway Company and by street railroads located on Broadway and on Tenth Avenue which are owned and operated by The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company. The aforesaid Third Avenue Railway Company, The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company and The Dry Dock, East Broadway and Battery Railroad Company and the Belt Line Railway Corporation are operated as part of the Third Avenue Railway System in the Borough of Manhattan, all of which companies exchange transfers between their intersecting lines without the exaction of any charge other than the initial five cent ($.05) fare paid by the passenger.

The street railroad of the Belt Line Railway Corporation on 59th Street is also intersected by lines of the following companies which are not a part of the Third Avenue Railway System: Second Avenue Railroad Company in the City of New York, Charles E. Chalmers, Receiver, operating a line on Second Avenue; New York Railways Company, Job E. Hedges, Receiver, operating lines on Lexington Avenue, on Sixth Avenue and on Seventh Avenue; New York & Harlem Railroad Company operating a line on Madison Avenue; Eighth Avenue Railroad Company operating a line on Eighth Avenue; Ninth Avenue Railroad Company operating a line on Ninth Avenue.

The street railroad on 59th Street was formerly owned by the Central Park, North & East River Railroad Company, and for some years prior to August 6, 1908, was operated successively by the Metropolitan Street Railway Company, New York City Railway Company and by Receivers thereof, and the same was operated as a part of the so-called Metropolitan Street Railway System which, during the said period operated all the lines hereinbefore referred to, including the lines now forming the Third Avenue Railway System. The Receivers of said Metropolitan Street Railway Company and said New [fol. 89] York City Railway Company were ordered by the Court not to adopt the lease under which the street railroad of the Central

Park, North & East River Railroad Company had been operated by said Metropolitan Street Railway Company, and at midnight between August 5th and 6th, 1908, the property of said Central Park, North & East River Railroad Company was returned to such company and operated by it until the appointment of a Receiver of said Central Park, North & East River Railroad Company who qualified in December, 1912. Thereafter, on November 14, 1912, the property and franchises of said Central Park, North & East River Railroad Company were sold under decree of foreclosure and sale, and in March 1912 the property and franchises were acquired from the purchaser thereof by the Belt Line Railway Corporation, and since such date the said railroads on 59th Street and First and Tenth Avenues and West Street have been operated as part of the Third Avenue Railway System, and transfers have, since that time, been exchanged between the 59th Street lines and the First and Tenth Avenue lines of said Belt Line Railway Corporation.

On October 29, 1912, the Public Service Commission for the First District, by order dated on that date, established through routes between the 59th Street line of the Belt Line Railway Corporation and all the intersecting street railroad lines hereinbefore described, including those lines which were not a part of the Third Avenue Railway System, whereby the Belt Line Railway Corporation and the companies operating the said intersecting lines were obligated to carry for a five cent ($.05) fare passengers desiring a through ride over the 59th Street line and any one of the intersecting lines or vice versa. The Belt Line Railway Corporation only receives the sum of two cents ($.02) for each passenger carried over a through route as established by said order of the Public Service Commission for the First District, dated October 29, 1912.

As shown by the affidavit of Bernard G. Steinetz, verified the 14th day of December, 1920, and submitted herewith, the said sum of [fol. 90] two cents ($.02) is not sufficient to pay the average cost of carrying such passengers without taking into consideration in such cost any return on the approved capital stock of the company, or without any allowance for a depreciation reserve, the said average cost to the Belt Line Railway Corporation of carrying each of its passengers being, as shown by affidavit of Bernard G. Steinetz submitted herewith.

3.20¢ in year ending June 30, 1918.
3.00¢ in year ending June 30, 1919.
3.46¢ in year ending June 30, 1920.
3.96¢ in four months ending October 31, 1920.

That, as more fully shown by the said affidavit of Bernard G. Steinetz, submitted herewith, the average daily loss incurred by the Belt Line Railway Corporation from all its operations during the four months ending October 31, 1920, without taking into consideration any return on approved capital stock or any allowance for a depreciation reserve was $232 per day.

That said order of the Public Service Commission for the First District, dated October 29, 1912, is, and is shown to be confiscatory

as to the Belt Line Railway Corporation, in that the service rendered by said company under the directions of such order has, for many years and does now subject said company to a constant and increasing loss each day that said company is required to furnish the service provided for in said order of October 29, 1912, and unless an injunction, as prayed for in the bill of complaint herein is granted pending the trial of this cause, the Belt Line Railway Corporation will suffer irreparable and irremedial damages. If an injunction, as prayed for in the bill, is granted pending the trial of this cause, all north and south bound passengers desiring a through route over the 59th Street line of the Belt Line Railway Corporation, or vice versa, may still secure the same for a five cent ($.05) fare by use of the lines operated as a part of the Third Avenue Railway System on First Avenue, on Third Avenue, on Broadway and on Tenth Avenue.

This application is presented to the District Judge for hearing [fol. 91] and determination as provided by Section 266 of the Judicial Code of the United States, for an order enjoining and restraining, pending the final judgment in this action and until the further order of this Court, the defendants and each of them and their and each of their officers, agents, servants and employes, and any and every person acting under and by virtue of the authority of the said order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912, and the Public Service Commission's Law of the State of New York, and any other law of the State of New York, insofar as any of said laws relates or provides for the enforcement of said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, from in any way enforcing or attempting to enforce the provisions of said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, against the complainant herein (excepting insofar as said order provides for joint rates, fares and charges between the lines of said complainant and the lines of the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company), and from bringing any action thereon to enforce any penalties against said complainant and from bringing any action or proceeding in mandamus or for an injunction in any court whatsoever, for the purpose of compelling compliance by said complainant with the said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, (excepting insofar as said order provides for joint rates, fares and charges between the lines of said complainant and the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company), and from doing any act or thing interfering with the right or authority of the complainant forthwith to discontinue the carrying out of the provisions of the order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912, (excepting insofar as said order provides

[fol. 92] for joint rates, fares and charges between the lines of the complainant, and the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company), and from doing any act or thing interfering with the right or authority of the complainant forthwith to exact and charge or receive for transportation upon its lines, the same rates and fares which it might lawfully exact and charge, if the provisions of said order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912, relative to the rate to be exacted or charged by the complainant, were not operative (excepting only as to passengers transferring to or from the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company), and for such other and further relief as to the Court may seem just and proper in the premises.

No previous application has been made for the relief herein asked for.

Edward A. Maher, Jr.

Sworn to before me, this 14th day of December, 1920. H. S. Jefferds, Notary Public, Kings County, No. 55. Certificate filed in Kings County Register's Office No. 1008. Certificate filed in New York County, No. 11. Certificate filed in New York County Register's Office No. 1186. Certificate filed in Bronx County No. —. Certificate filed in Bronx County Register's Office No. —. Commission expires March 30, 1921.

[fol. 93] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF BERNARD G. STEINETZ

Bernard G. Steinetz, being duly sworn, deposes and says:

I am the Auditor of the Belt Line Railway Corporation, and am familiar with the accounts and records of such corporation, including the details of the cost of the operation of such street railway.

Between the years 1913 and 1920, the cost of street railroad operation has increased, due to the increase in the cost of labor and materials incident to such operation.

The cost of power used in the operation of the company's cars has been materially affected by the increase in the cost of coal used in the generation of such power, with the result that the cost of power has increased from one and 2/10 cents (.012) per D. C. KWH in 1913 to one and 852/1000 cents (.01852) per D. C. KWH in 1920.

The cost of maintenance of track and roadway of the Company has increased between 1913 and 1920, due to increased cost of labor and materials required for such maintenance work. Such increased cost of materials is shown by the following typical items [fol. 94] with the relative market prices thereof in 1913, as compared with 1920.

Roadway and track	1913	1920	Per cent increase
Ties—creosoted	$.87 each.	$2.17 each.	150%
Rails per ton	38.90	71.20	83
Paving—Granite Block	3.50 pr. sq. yd.	8.00	128
Asphalt	2.25 " " "	5.50	144
Wood Block	3.00 " " "	7.50	114
Labor—average per day	2.17	4.29	98

The cost of maintenance of equipment has increased between 1913 and 1920, due to the increased cost of labor and materials. Such increased cost is shown by the following typical items, with the relative prices thereof in 1913 as compared with 1920.

Equipment	1913	1920	Per cent increase
Steel Wheels	$13.00 each	$33.75 each.	160%
Iron Wheels	1.375 C lbs.	3.42 C lbs.	149
Lumber	85.00 M ft.	240.00 M ft.	182
Axles	2.49 C lbs.	4.75 C lbs.	91
Brake Shoes	36.00 ton.	69.00 ton.	92
Glass	3.82	8.96	135
Labor—average per day	2.09	4.37	109

The cost of operation of the Company's cars has increased between 1913 and 1920, due to numerous increases in the wages of conductors and motormen. The wages of conductors in 1913 ranged from 22 to 27¢ per hour, whereas in 1919 such wages ranged from 49 to 62¢ per hour, while since July, 1920 the rates have ranged from 54 to 67¢ per hour. The wages of motormen in 1913 ranged from 25 to 28½¢ per hour, whereas in 1919 such wages ranged from 49 to 62¢ per hour, while since July 1920 the rates have ranged from 54 to 67¢ per hour.

The cost of operation, including taxes, of the Belt Line Railway Corporation has increased from an average of 26 and 79/100 cents per car mile in 1914 to 72 and 8/100 cents per car mile in 1920, [fol. 95] not including in such cost in any of such years any return on approved capital stock, and not including in such cost since the year 1916 any reserve for depreciation.

The average cost to the Belt Line Railway Corporation of carrying each of its passengers increased from .02 63/100 in 1914 to .03 96/100 in 1920, not including in such cost in any year any return on approved capital stock and not including since Jan. 1, 1916 any reserve for depreciation.

In the year ending June 30, 1918, the total operating revenues of the company amounted to $631,148. The total operating expenses including fixed charges on approved first mortgage and note, but without including any allowance for depreciation or return on

approved capital stock, amounted to $664,989.89, leaving a deficit of $33,841.89, which deficit would of course be increased if an allowance for depreciation had been deducted.

In the year ending June 30, 1919, the total operating revenues of the company amounted to $563,719.39. The total operating expenses including fixed charges on approved first mortgage and note, but without including any allowance for depreciation or return on approved capital stock, amounted to $559,290.44 leaving a balance of $4,428.95 which would be turned into a deficit if an allowance for depreciation had been deducted.

In the year ending June 30, 1920, the total operating revenues of the company amounted to $593,950.78. The total operating expenses, including fixed charges on approved first mortgage and note, but without including any allowance for depreciation or return on approved capital stock, amounted to $618,366.72, leaving a deficit of $24,415.94.

For the four months ended October 31, 1920, the total operating [fol. 96] revenues of the company amounted to $192,925.23. The total operating expenses, including fixed charges on approved first mortgage and note, but without including any allowance for depreciation or return on approved capital stock, amounted to $221,541.10, leaving a deficit for such four months of $28,615.87.

The deficit from operation for the four months ended October 30, 1920, without the deduction of any depreciation reserve, amounts, as hereinbefore shown, to the sum of $28,615.87, or at the rate of $232 per day, and if the necessary depreciation reserve was deducted the loss per day would be greatly in excess of $232.

During the four months ended October 31, 1920, 3,077,007 joint-rate passengers were carried by the Belt Line Railway Corporation, from each of which passengers the company received 2¢. The average cost of carrying each passenger during such four month period, without allowing any return on approved capital stock, and without deducting any allowance for depreciation, was .03 96/100 per passenger, or a loss of .01 96/100 per joint-rate passenger, which represents a loss on said 3,077,007 joint-rate passengers of $60,309.33 for such four month period.

That during the period from March 22, 1913, to January 1, 1916, the company set upon its books a depreciation reserve at the rate of $60,000 per year, but since said January 1, 1916, the company has not set upon its books any depreciation reserve. The depreciation reserve as of January 1, 1916, amounted to $166,500. During the period March 22, 1913, to October 31, 1920, the company had to make retirements of capital involving a loss amounting to $353,798.95. Such retirements were made by charging against and wiping out the above depreciation reserve, and then charging the balance of such retirement, to wit, $187,298.95, against surplus. If the company had, since January 1, 1916, set upon its books a sufficient depreciation reserve in each year to just take care of the [fol. 97] actual retirements of capital, there would have been charged a depreciation reserve of at least $40,000, in each of said years, 1917, 1918, 1919 and 1920, so that the deficits from operation for 1917, 1918, 1919 and 1920, as shown on Exhibit J attached

to the bill of complaint herein, would, if such reserve had been set up on the books, have been increased by at least $40,000 in each year, and the net corporate income of $7,159.11 for the year 1919, as shown by said Exhibit J, would have been in fact a deficit of about $33,000, and the deficits which would have thus been shown would be only such deficits as resulted from the charging in such years of only such depreciation reserve as was actually needed for the retirement of capital made during the period shown on said Exhibit J, and which deficits would be further increased if a proper depreciation reserve had been set up in each year so that the company would now have a reserve for any future replacements of property or retirements of capital.

Bernard G. Steinetz.

Sworn to before me, this 14 day of December, 1920. H. S. Jefferd, Notary Public, Kings County, No. 55. Certificate Filed in King's County Register's Office No. 1008. Certificate Filed in New York County, No. 11. Certificate Filed in New York County Register's Office No. 1186. Certificate Filed in Bronx County No.—. Certificate Filed in Bronx County Register's Office No.—. Commission Expires March 30, 1921.

[fol. 98] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF BERNARD G. STEINETZ

Bernard G. Steinetz, being duly sworn, deposes and says: I am auditor of the Belt Line Railway Corporation and am familiar with the accounts and records of such corporation, including the details of the cost of the operation of its street railway. I am also familiar with the proceeding before the Public Service Commission on the application of the Belt Line Railway Corporation for modification of the order of October 29, 1912.

I have examined the two affidavits of John Bauer, verified respectively on December 29, 1920, and January 5, 1921, submitted by the defendant Swann in opposition to the motion herein. The figures in said affidavits and in the tabulation attached to the affidavit verified January 5, 1921, are the same figures testified to before the Public Service Commission by Dr. Bauer, who was called as a witness on behalf of the City of New York, in opposition to the company's application for modification of the order of October 29, 1912.

[fol. 99] Upon Dr. Bauer's cross examination before the Public Service Commission he admitted that many items of expense of the Belt Line Railway Corporation could not be segregated between the 59th Street crosstown line and the west belt line without the use

of arbitrary factors of segregation. In Dr. Bauer's affidavits he makes no reference to and does not include in his so-called valuation of the plaintiff's property the car barn of the plaintiff situated at the corner of Tenth Avenue and 54th Street in the Borough of Manhattan, City of New York, which car barn is assessed by the City of New York for the year 1921 at the sum of $830,000. The statement in Dr. Bauer's affidavit sworn to January 5, 1921, that the financial statements attached to said exhibit are based upon the company's sworn reports to the Commission, is untrue, because of the fact that he has omitted therefrom certain items contained in the reports of the company to the Public Service Commission for the years indicated on such statement, one of the items so omitted being the amounts actually paid by the Belt Line Railway Corporation for rental of cars used in the operation of the 59th Street line.

The average cost per passenger, as set forth in the bill of complaint herein and also in exhibits "F," "C," "H" and "I" attached thereto, were arrived at by dividing the total cost of the operation of the street railway by the actual number of passengers carried.

The number of passengers carried directly affects the amount of service required, so that the way to determine the cost of carrying each passenger for such service rendered is to divide the entire expense of the company by the number of passengers carried. In the operation of the 59th Street line of the plaintiff the five-cent cash fare passengers and the two cent through route passengers board the cars at the various street intersections, and in carrying these [fol. 100] passengers the same cars, the same crew, the same tracks and the same general and overhead expense are used and incurred by the company. Furthermore, a through route passenger boarding a car on the 59th Street line at any street intersection may travel the same distance as a five cent cash fare passenger boarding the same car at the same point, and the fact that the cars used by such through route passenger must be operated to their destination, irrespective of the length of ride that either the through route passenger or the five cent cash fare passenger desires to make thereon, shows that the average cost of carrying a two cent through route passenger is exactly the same as the average cost of carrying any passenger upon said line.

Bernard G. Steinetz.

Sworn to before me this 11th day of January, 1921. H. S. Jefferds, Notary Public, Kings County, No. 55. Certificate filed in Kings County Register's Office No. 1008. Certificate filed in New York County, No. 11. Certificate filed in New York County Register's Office No. 1186. Certificate filed in Bronx County No. —. Certificate filed in Bronx County Register's Office No. —. Commission expires March 30, 1921.

[fol. 101] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION PER CURIAM—Filed January 26, 1921

Motion for preliminary injunction enjoining the operation of the Public Service Commission's order, dated October 29, 1912, insofar as it fixes at five cents the maximum joint rate or fare to be exacted for through transportation over the lines of the plaintiff and the lines operated by all other street service railway corporations or any of them named in said order,—except Third Avenue Railway Company and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, on the ground that the same has become and now is in contravention of Section 10 of Article 1 of, and the 14th Amendment of the Constitution of the United States.

Alfred T. Davison, for plaintiff.

Winthrop & Stimson, Solicitors for the Receivers of New York Railways Company, as amici curiæ.

Wilbur W. Chambers, Ely Neumann, M. Maldwin Fertig and Charles Horowitz, for the several defendants.

John P. O'Brien, Corporation Counsel, for Swann, Dist. Atty.

[fol. 102] Per CURIAM:

This motion in substance seeks to have abrogated as confiscatory, and therefore unconstitutional, the system by which the Fifty-ninth Street crosstown surface line is obliged to issue to and receive transfers from passengers desiring to exchange at the intersection of 59th Street with Seventh, Sixth, Lexington, Second and First Avenues in the Borough of Manhattan; the result of which system is that for each passenger so exchanging, and from a through rate of five cents the plaintiff receives two cents and no more.

As the result of this long-standing system the major portion of the passengers on plaintiff's crosstown line, pay a fare of two cents only to plaintiff;—the proportion of two cent passengers to five cent passengers being (with sufficient accuracy for present purposes) in the proportion of ten to seven.

The facts presented are simple, and not in dispute. The propositions of law are easy to state, and their elaborate discussion unnecessary in a court of first instance. For these reasons we shall content ourselves with briefly stating our findings of fact and legal conclusions therefrom.

[fol. 103] 1. Plaintiff is a corporation organized in 1911, which by purchase in foreclosure acquired the franchises, property and rights formerly of the Central Park, North and East River Railroad Company, and by virtue of such acquisition became authorized to operate a surface railway on 59th Street between First and Tenth Avenues, on First Avenue between 59th Street and 14th Street, and

on Tenth Avenue and West Street between 59th Street and the Battery.

2. It is still operating what is known as the Crosstown line on 59th Street, and that on West Street and Tenth Avenue, but the operation of the line on First Avenue south of 59th Street has been abandoned with the assent of the Public Service Commission.

3. Plaintiff is subject to the operation of the Commission's order of October 29, 1912, under which no greater fare than five cents can be charged for the through transportation of one passenger, and of such fare of five cents the two cents long allotted by treaty or agreement to plaintiff is a fair and equitable provision. For the year ending June 30, 1920, the actual cost to plaintiff of carrying each passenger was 3.46 cents of which sum .53 cents represents interest on first mortgage bonds and other borrowed money.

[fol. 104] 4. For the period of four months ending October 31, 1920, said actual cost was 3.96 and the carrying charges for borrowed money amounted to .56.

5. For the year ending June 30, 1920, a comparison between the actual cost of carrying passengers plus interest on borrowed money and the total income of the plaintiff from every source showed a deficit of $20,814.82, and by the same comparison a deficit exists of $28,120.27 for the four months ending October 31, 1920.

These calculations allow for payment of taxes but do not cover any reserve or any sum for replacement or depreciation of physical property.

By the same system of computation the accumulated deficit without depreciation allowances of this plaintiff since January 1, 1916 amounts to $201,270.13.

6. In May, 1920, plaintiff applied to the Public Service Commission for a modification of the order of October 29, 1912, substantially praying to be relieved from the obligation to carry passengers for two cents,—in other words to abolish transfers at the points above mentioned.

7. Hearings were had before the Commission under the above application, and on July 9, 1920, the Commission entered an order holding that the joint rate of five cents fixed by the order of October [fol. 105] 29, 1912, had by reason of changed conditions become "unjust, unreasonable and insufficient to render a fair and reasonable return for the service furnished;" wherefore "(continued the order)" the said maximum joint fare or rate was fixed" commencing September 13, 1920, at the sum of seven cents instead of five cents.

8. Thereupon plaintiff on July 23, 1920, applied for a re-hearing pursuant to Section 22 of the Public Service Commissions Law (Consol. Laws, C. 48) and in respect of the matters determined in and by said order of July 9th.

9. On November 4, 1920, the Commission made an order granting said application for re-hearing, and on November 5th entered an order by which it "deferred and postponed" the operation of the order of July 9, 1920, "until such date or dates as shall or may be fixed by the Commission at or after the termination of such re-hearing."

10. The matter of the rehearing before the Commission was terminated on November 10, 1920 was then finally submitted to said Commission for decision and has never been decided, although Section 22 of the Public Service Commissions Law requires that any rehearing "shall be determined by the Commission within thirty days after the same shall be finally submitted."

[fol. 106] This bill was filed more than thirty days after such final submission to the Commission.

11. Plaintiff's method of computing cost per passenger by including as an item of expense interest on borrowings, is proper; and the abandonment of the "East Side Belt Line" makes no difference in the indebtedness or the interest thereupon of the plaintiff. The debt attaches to every part of the line, and almost all of said debt is represented by first mortgage bonds approved by the defendant Commission.

12. The action or non-action of the Public Service Commission has in effect continued and is now continuing in force the order of 1912.

13. The deficits produced by plaintiff's carriage of a majority of all passengers for two cents a piece, amount to or result in confiscation.

14. In this case the "legislative" act of rate-making is complete and is now requiring carriage of passengers at a rate resulting in confiscation.

15. The only remedy for or review of such rate or rate-making under the laws of the State of New York is the writ of certiorari, which remedy is wholly judicial.

16. By reason of the neglect or refusal of the defendant Public [fol. 107] Service Commission to render any decision in respect of a re-hearing of the matters involved in the order of July 9, 1920, no certiorari is now possible; nor will the issuance of such writ ever be possible unless and until by mandamus or proceedings in the nature thereof the Public Service Commission is required to comply with Section 22 aforesaid.

17. When the legislative remedy for the creation or maintenance of a confiscatory rate is exhausted, the parties injured may choose their forum of reviews and assert their rights (as has here been done) in the Courts of the United States (Home Telephone Co. vs. Los Angeles, 211 U. S. at 278; 29 Sup. Ct. 50; 53 L. Ed. 176; Prentis vs. Atlantic Coast Line, 211 U. S., 210, 228; 29 Sup. Ct. 67; 53 L. Ed. 150; Bacon vs. Rutland R. R., 232 U. S., 134; 34 Sup. Ct. 283; 58 L. Ed. 538).

18. In the case at bar the aggregate transactions of the plaintiff are resulting, and long have resulted, in failure to pay actual operating expenses. This fact renders unnecessary an inquiry of the character considered in Chesapeake, etc. R'y vs. Public Service Commission, 242 U. S., 603; 37 Sup. Ct., 234; 61 L. Ed. 520.

19. This decision is limited to the enjoining of the transfers complained of in combination with, or as obtainable from a five cent fare. The basic fare of five cents is not attacked in this litigation.

The motion is granted and order filed herewith.
Dated, Jany. 25, 1921.
File: C. M. H. L. H. J. M. M.

[fol. 108] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING INTERLOCUTORY INJUNCTION

This cause coming on to be heard upon motion for injunction pendente lite and having been heard by the Court pursuant to Section 266 of the Judicial Code of the United States, and having been argued by counsel and due deliberation having been had, it is now

Ordered and decreed: that the defendants, and each of them, and their, and each of their, officers, agents, servants and employes, and any and every person acting under and by virtue of the authority of the order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912, and the Public Service Commissions Law of the State of New York, and any other law of the State of New York, in so far as any of said laws relates or provides for the enforcement of said order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912, are hereby ordered to be enjoined from in any way enforcing or attempting to enforce the provisions of said order of the Public Service Commission of the State of New York for the First District, [fol. 109] dated October 29, 1912, against the plaintiff herein (excepting in so far as said order provides for joint rates, fares, and charges between the lines of said plaintiff and the lines of the Third Avenue Railway Company, and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company), and from bringing any action thereon to enforce any penalties against said plaintiff, and from bringing any action or proceeding whether in mandamus or for an injunction or otherwise in any court whatsoever, for the purpose of compelling compliance by said plaintiff with the said order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912 (excepting in so far as said order provides for the joint rates, fares and charges between the lines of the said plaintiff and the lines of the Third Avenue Railway Company, and The Forty-second Street, Manhattanville & St. Nicho-

las Avenue Railway Company); and from doing any act or thing interfering with the right or authority of the plaintiff forthwith to discontinue the carrying out of the provisions of the order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912, (escepting in so far as said order provides for the joint rates, fares and charges between the lines of the said plaintiff and the lines of the Third Avenue Railway Company, and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company); and from doing any act or thing interfering with the right or authority of the plaintiff forthwith, to exact a charge or receive for transportation upon its lines, the same rates and fares which it might lawfully exact and charge, if the provisions of the said order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912, relative to the [fol. 110] rate to be exacted or charged by the plaintiff, were not operative (excepting only as to passengers transferring to or from the lines of the Third Avenue Railway Company, and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company); and it is further

Ordered and decreed: that a temporary writ or injunction embodying the ruling hereinabove made issue out of and under the seal of this Court forthwith, and that said writ or injunction shall be and remain in full force and virtue until further order of the Court in the premises.

Dated Jan'y 25/1921.

C. M. Hough, C. J. Learned Hand, D. J. Julius M. Mayer, D. J.

[fol. 111] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT AND NOTICE OF MOTION TO SUBSTITUTE THE TRANSIT COMMISSION, STATE OF NEW YORK, AS DEFENDANT IN PLACE AND STEAD OF PUBLIC SERVICE COMMISSION

Please to take notice that at a stated Term of the Court to be held at the Woolworth Building (Court Room No. 1.) in the Borough of Manhattan and City of New York, on Monday the 26th day of June, 1922, at the opening of Court on that day, or as soon thereafter as Counsel can be heard, upon the pleadings herein, and upon the affidavit of Howard Thayer Kingsbury, verified June 21st 1922, application will be made for the following relief:

1. To substitute the Transit Commission as a defendant in the place of the defendant Public Service Commission, First District, and to enter the appearance of said Transit Commission by George G. Redington, Esq. as Solicitor and Howard Thayer Kingsbury, Esq. as Counsel.

2. To amend the Answer of the defendant Public Service Commission, First District, (Transit Commission, successor) by adding thereto the following:

"And for a second separate defence to complainant's alleged cause of action this defendant further alleges:

XIV. Upon information and belief that complainant was incorporated on December 24th, 1912, subsequent and subject to the Order of the Public Service Commission of October 29th, 1912, re-
[fol. 112] ferred to in the Bill of Complaint herein, and is therefore not entitled to complaint of said Order as an infringement of any Constitutional rights of complainant."

3. That such defense be separately heard and disposed of before the trial of the principal case.

4. That the preliminary injunction heretofore issued herein on or about January 26th, 1921, be vacated or modified so as not to enjoin the defendant Transit Commission from interfering with the authority of complainant to charge and receive for transportation upon its Lines the same fares which it might charge if the provisions of said Order of October 29th, 1912 were not operative and so as to permit the Transit Commission to fix a new joint rate in connection with transfers to and from the Line of complainant, if it shall be so advised.

5. For such other and further relief as may be just and proper.

Dated June 21st, 1922.

Howard Thayer Kingsbury, Special Counsel for Transit Commission, No. 2 Rector Street, N. Y.

To Alfred T. Davison, Esq., Solicitor for Complainant.

[fol. 113] [Title omitted]

Howard Thayer Kingsbury, being duly sworn says: I am Special Counsel to the Transit Commission, State of New York, and have been duly authorized to appear as such Special Counsel for said Commission in the above entitled suit. The said Transit Commission was created by an Act of Legislature of the State of New York, being Chapter 134 of the Laws of 1921, which became a law on March 30th. 1921. Under said Act the Transit Commission succeeded to all the functions of the defendant Public Service Commission, First District, so far as they are involved in this suit. I was duly appointed Counsel to the Transit Commission on or about June 15th, 1921, and continued as such until February 15th, 1922, when I resigned and George O. Redington, Esq. was appointed Counsel in my place. Thereafter I was retained and authorized to appear as special Counsel for the Transit Commission in this litigation.

By reason of the multiplicity of my other duties as such Counsel it was impossible for me to make a careful examination of the pleadings in this suit until shortly before the case was about to come on for hearing. I then ascertained that the date of complainant's [fol. 114] incorporation is not stated in either the Bill of Complaint or in the Answer. It is desired to amend the Answer by pleading as a separate defense that the complainant was incorporated on December 24th, 1912, subsequent and subject to the order of the Public Service Commission of October 29th, 1912, referred to in the Bill of Complaint herein, and is therefore not entitled to complain of said Order as an infringement of any constitutional right of complainant.

This defense is based upon the decision of the Supreme Court of the United States in the case of Interstate Railway Company vs. Massachusetts, 207 U. S. 79.

In the opinion by this Court upon the motion for preliminary injunction herein reported in Belt Line Railway Corporation vs. Newton, 273 Fed. 272, it is erroneously stated that "plaintiff is a corporation organized in 1911". For this reason it is particularly desired that the facts should be correctly alleged in the pleadings. The correct date of the incorporation of complainant appears by a certified copy of the Certificate of Incorporation which is ready to be produced as the Court may direct.

By the decision of the Supreme Court above referred to it was held that a corporation which took its charter after the passage of an Act of Legislature was not entitled to complain of such Act of Legislature as constituting an infringement of any of its constitutional rights.

It is futher desired that this defence be heard and determined separately before the trial of the principal case.

The fact that the complainant acquired its railroad properties involved in this suit after the making of the Order of October 29th, 1912, appears by the Bill of Complaint and this will be relied upon as one of the grounds of a motion to dismiss the complaint, notice of which will be given for June 26th, 1922, at the same time with the motion to be made upon this affidavit.

[fol. 115] Although the opinion of this Court above referred to states that "this decision is limited to the enjoining of the transfers complained of in combination with, or obtainable from a five cent fare," the order of injunction entered on January 26th, 1921, in effect restrains the Commission from fixing any new joint rate in connection with transfers to and from complainant's Line and thus goes beyond the terms of the Court's opinion. When this case was called for trial on June 21st, 1922, before Hon. Charles M. Hough, United States Circuit Judge, it was intimated by the Court that it would be referred to a Master. This will necessarily involve a substantial and wholly unexpected further delay in its determination. It is accordingly prayed that the order of injunction heretofore issued be vacated or modified.

Said decision upon said motion for preliminary injunction was based, it is respectfully submitted, upon certain erroneous grounds, especially the following:

(a) That it is proper in computing operating expenses to include interest on borrowed money, which actually represent a return upon invested capital.

(b) That in determining whether the requirement of giving and receiving transfers upon a joint rate is confiscatory, it is proper to consider the average computed cost of carrying all passengers, whereas the test should be a comparison between the added expense due to the carrying of transfer passengers with the revenue received from such transfer passengers.

It is further submitted that although the decision upon the motion for preliminary injunction was rendered by a Court composed of three Judges under §266 of the Federal Judicial Code the case did not properly come within the provisions of that Section since the Bill of Complaint did not put in question the constitutionality of any statute whatever.

Howard Thayer Kingsbury.

Sworn to before me this 21st day of June, 1922. Thomas W. Kelly. Notary Public, New York County. New York County Clerk's No. 15, New York County Register's No. 3108, Commission Expires March 30, 1923. (Seal)

[fol. 116] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS BILL OF COMPLAINT

Please to take notice that at a stated Term of this Court to be held at the Woolworth Building (Court Room No. 1.) in the Borough of Manhattan and City of New York, on Monday the 26th day of June,. 1922, at the opening of Court on that day, or as soon thereafter as counsel can be heard. a motion will be made on behalf of the defendant Transit Commission to dismiss the Bill of Complaint herein, upon the following grounds:

1. That this cause is not within the jurisdiction of this Court.

2. That the Bill of Complaint is lacking in equity and fails to state facts sufficient to entitle the complainant to any equitable relief.

3. That it appears from the allegations of the Bill that complainant acquired its Street railroad properties and undertook their operation subsequent and subject to the Order of the Public Service Commission of October 29th, 1912, and is therefore not entitled to com-

plain thereof as an infringement of any constitutional right of complainant.

Dated June 24th, 1922.

Howard Thayer Kingsbury, Special Counsel for Transit Commission, No. 2 Rector Street, N. Y.

To Alfred T. Davison, Esq., Solicitor for Complainant.

[fol. 117] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION AND ORDER APPOINTING SPECIAL MASTER

Judge HOUGH:

Motions by the Transit Commission (1) to substitute said Commission as a defendant in place of the original defendant Public Service Commission; (2) to amend the answer of said Public Service Commission by adding a second and separate defence, viz: that complainant was incorporated December 24, 1912, which was subject to the order of October 29, 1912, enforcement of which is complained of in the bill; wherefore plaintiff is not lawfully entitled to complain of said order or of any of the results thereof; (3) to hear this defence before the trial of the principal cause; (4) to vacate or modify the injunction now in force in particulars which need not be stated; (5) to dismiss the bill on the pleadings as amended, because

a. The cause is not within the jurisdiction of this Court;

b. The bill fails to state facts sufficient to entitle plaintiff to any equity herein;

c. Because plaintiff acquired its properties and undertook their operation subsequent to the Order of October 29, 1912. (This motion is merely a formal statement of the result thought to flow from the interposition of amendment to the answer.)

[fol. 118] Mr. Kingsbury for the Transit Commission, whose argument and contentions were adopted by the Corporation Counsel of the City of New York as attorney for the District Attorney of the County of New York.

Mr. Davison for the plaintiff.

Memorandum

Motion No. 1 is granted on consent.

Motion No. 2 is granted on the stipulation made in open Court that the articles of incorporation of the plaintiff Company should be deemed a part of the answer.

Motion No. 3 has been granted, as this memorandum evidences. Motions Nos. 4 and 5 will now be considered.

On or about January 25, 1921, an application for preliminary injunction was heard by a Court organized under Section 266 of the Judicial Code. That Court acted upon facts. To be sure, the facts were set up by affidavit, but that is one method of adducing evidence.

The result of that hearing was to grant an injunction pendente lite. I am without power to vary or re-interpret the facts substantially found by that Court. This proceeding can only be held under Equity Rule 29; that is to say, I have the power (in discretion) to "call up and dispose of before final hearing" a motion which under the old practice might have been raised by demurrer or plea.

Viewed in this light, defendant's argument simmers down to two points:

(1) That an order of the kind complained of cannot in point of law become confiscatory, and therefore obnoxious to the 14th amendment.

[fol. 119] An order, whether called a rate order or a service order, is never per se confiscatory unless one suppose that the decree or direction required services wholly gratuitous. Such a supposition is too extreme to be entertained.

Whether any order, decree or direction is confiscatory in the sense of refusing a fair return upon invested capital is a question of fact, and the facts vary with the times. The presumption is that when the order complained of was made it was a perfectly proper order. But what plaintiff is complaining of is really that the times have so changed that the order which was proper in 1912 was confiscatory in 1921. I cannot say as matter of law that no confiscation occurred. Nor, under the decree pendente lite can I re-examine the facts on affidavit. Consequently the matter must be left to final hearing.

(2) Defendant's second point is that since the order complained of was in force when this plaintiff obtained its present charter it is without legal right to complain thereof; and for this proposition reliance is placed upon Interstate Railway Co. vs. Massachusetts, 207 U. S. 79.

On this not uninteresting point I entirely agree with the argument of defendant, viz: the case cited treated a general statute of Massachusetts, which is a very different thing from the regulatory order of a Commission.

But under Section 9 of the New York Stock Corporation Law as amended after Miner vs. The Erie., etc., Co. 171 N. Y. 566, the plaintiff Company has the same and as great a right to complain of this order as the North & East River Company would have had had [fol. 120] no foreclosure occurred. For this proposition People, etc., vs. Public Service Commission, 203 N. Y. 299, is in my opinion authority,—if any be needed.

For these reasons the motion of the defendant Transit Commission is denied and the case ordered for trial before a Master.

Hon. E. Henry Lacombe is hereby named as the Master to serve in this case.

June 28, 1922.

C. M. Hough, C. J.

[fol. 121] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUBSTITUTING THE TRANSIT COMMISSION, STATE OF NEW YORK, AS DEFENDANT IN PLACE AND STEAD OF PUBLIC SERVICE COMMISSION

The Transit Commission, State of New York, having applied to the Court to be substituted as a defendant in the above entitled cause in the place of the defendant Public Service Commission, First District, and to enter its appearance therein and to amend the answer of the defendant Public Service Commission, First District, (Transit Commission, successor) by adding thereto a second separate defense set forth in the Notice of Motion dated June 21st, 1922, and that such defense be separately heard and disposed of and that the preliminary injunction heretofore issued herein on or about January 26th, 1921, be vacated or modified.

[fol. 122] And the said Transit Commission having further moved to dismiss the Bill of Complaint herein upon the grounds stated in Notice of Motion dated June 24th, 1922.

And said Motions having come on to be heard on June 26th, 1922,

Now, upon the return of and on reading and filing the Notice of Motion dated June 21st, 1922, and the affidavit of Howard Thayer Kingsbury, sworn to June 21st, 1922 thereto annexed, and the Notice of Motion to dismiss the Bill of Complaint dated June 24th, 1922, and upon the pleadings herein, and Counsel for the Transit Commission having stipulated in open Court that a copy of the Certificate of incorporation of Complainant be read as a part of the proposed second separate defense,

And after hearing Howard Thayer Kingsbury, Esq., Special Counsel for the Transit Commission, and Charles Horowitz, Esq., Assistant Corporation Counsel on behalf of the defendant the District Attorney of the County of New York in support of the Motion and Alfred T. Davison, Esq., Counsel for the plaintiff in opposition thereto, excepting such relief as is hereinafter stated to be on consent,

And due deliberation having been had and the Court having made and filed its opinion, it is

Ordered as follows:

1. That, the Counsel for the plaintiff having consented thereto, the Transit Commission be and it hereby is substituted as a defend-[fol. 123] ant herein in place of the defendant Public Service Commission, First District, and that the appearance of said Transit

Commission be entered herein by George O. Redington, Esq., as Solicitor and Howard Thayer Kingsbury, Esq., as Counsel;

2. That, the counsel for the plaintiff having consented thereto, the answer of the defendant Public Service Commission, First District, (Transit Commission successor) be and it hereby is amended by adding thereto the following:

"And for a second separate defence to complainant's alleged cause of action this defendant further alleges:

"XIV. Upon information and belief that complainant was incorporated on December 24th, 1912, subsequent and subject to the Order of the Public Service Commission of October 29th, 1912, referred to in the Bill of Complaint herein, and is therefore not entitled to complain of said Order as an infringement of any Constitutional right of complainant. A copy of complainant's Certificate of Incorporation is hereto annexed and is to be read as a part of this defense."

3. That, complainant's counsel having admitted in open Court that the date of complainant's incorporation was correctly stated in said second separate defense and that the copy of the complainant's Certificate of Incorporation was correct, such second separate defense be separately heard and disposed of before the trial of the principal case;

4. That the said second separate defense having been thereupon separately heard and argued by counsel, said second separate defense [fol. 124] be and hereby is adjudged to be insufficient in law and that such defense be and it hereby is overruled.

5. That the motion to vacate the preliminary injunction heretofore issued herein on or about January 26th, 1921, be and it hereby is denied, and the matter left to final hearing;

6. That the motion to dismiss the Bill of Complaint herein be and it hereby is denied;

7. That this cause be and it hereby is referred to Hon. E. Henry Lacombe as Master to hear the allegations and proofs of the parties and report to this Court with all convenient speed the evidence taken by him, together with his findings and conclusions thereon.

C. M. Hough, U. S. C. J.

[fol. 125] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPORT OF THE SPECIAL MASTER

By order of this Court, made June 28th, 1922, the Transit Commission was substituted as a defendant in place of the original de-

fendant, Public Service Commission. Wherever the words " the Commission" hereinafter occur, they refer indifferently to this original and to this substituted defendant.

Report of Master

E. HENRY LACOMBE, Master:

The designation of the undersigned as master in this proceeding is found in a decree or decretal order of this Court dated July 24, [fol. 126] 1922, which disposes of various matters then before it and concludes with the following paragraph:

"7. That this cause be and it hereby is referred to Hon. E. Henry Lacombe, as Master to hear the allegations and proofs of the parties and report to this Court, with all convenient speed, the evidence taken by him, together with his findings and conclusions thereon."

The cause was brought on for the first hearing before the master on October 19th, 1922, and the following appearances were noted:
Alfred T. Davison, Solicitor and Counsel for complainant.
George O. Reddington, Counsel to the Transit Commission.
George H. Stover, Law department of Transit Commission, and Howard Thayer Kingsbury, Special Counsel.
John P. O'Brien (and later)
George P. Nicholson, Corporation Counsel, Solicitor for District Attorney.
M. M. Fertig, Henry Hartzoff, of Counsel.

There were many sessions, at which testimony was taken; the case was finally submitted on briefs and argument April, 1923.

Before reciting the proceedings prior to the appointment of the master it will be convenient to set forth the issues in controversy as the same are presented by the pleadings.

Pleadings and Issues

The complaint, verified December 14th, 1920, alleges that com- [fol. 127] plainant is a street railroad corporation incorporated under Chapter 49 of the New York Consolidated Laws (The Railroad Law) and is the owner of the property, franchises and rights formerly belonging to the Central Park, North and East River R. R. Company, located on public streets in New York City, including 59th Street, between First and Tenth Avenues; First Avenue, between 59th and 14th Street; and Tenth Avenue and West Street, between 59th Street and the Battery. That said property was bought in March, 1913, from the purchaser thereof under decree of foreclosure made February 16th, 1911, in a suit brought by the Farmer's Loan and Trust Company.

The answer of the Public Service Commission, dated February 7, 1921, admits these allegations; the answer of defendant District

Attorney dated January 6, 1921, denies knowledge or information sufficient to form a belief in reference thereto.

The complaint next avers that the C. P. N. & E. R. R. R. Co., was on July 19, 1860, duly incorporated under Chapter 140, Laws of 1850, and the acts amendatory thereof and acquired all the rights and franchises acquired by the individual grantees under Chapter 511, Laws of 1860. That thereafter, pursuant to such statute, the Board of Councilmen and the Board of Aldermen did, on December 28, 1861, adopt a resolution authorizing the C. P. N. & E. R. R. R. company to construct, maintain, and operate said railroad, authorized by Chapter 511 of 1860, upon and along the streets and avenues mentioned in said Act, including the streets and avenues theretofore in the complaint enumerated; said resolution being approved by the Mayor on December 31, 1861.

[fol. 128] The answer of the Public Service Commission admits these allegations; the answer of the District Attorney denies knowledge or information sufficient to form a belief in reference thereto.

The Complaint next avers: that plaintiff (called hereinafter Belt Line) ever since March 22, 1913, has been operating a street railroad along 59th Street between First and Tenth Avenues, and along Tenth Avenue and West Street from 59th Street to the Battery.

That in June, 1919, Belt Line relinquished and abandoned, with the approval of the Public Service Commission, its right, privilege and franchise to maintain and operate a surface railroad over the streets on the easterly side of New York between 14th Street and the Battery. That the rights, etc., to operate a railroad over First Avenue between 59th and 14th Streets (formerly operated by C. P. N. & E. R. R. R.) are now being operated by the Dry Dock, East Broadway and Batter R. R. Co., pursuant to agreements with the Belt Line. "Such operation results in a loss to the Dry Dock E. B. & Battery R. R., but such losses are not included in the losses set forth in the complaint."

That the railroad on 59th Street between First and Tenth Avenues is a double track underground slot electric railroad. That the railroad on Tenth Avenue between 59th and 34th Streets is of the same type; that the railroad operated by Belt Line on Tenth Avenue and West Street between 34th Street and the Battery is of the electric storage battery type.

The answer of the Public Service Commission of the First District admits all these allegations except the one which avers that operation results in a loss to the Dry Dock R. R.

[fol. 129] The answer of the District Attorney denies knowledge or information sufficient to form a belief.

The complaint next avers the official status and residence of the defendants, the Attorney General, the District Attorney and the Public Service Commission for the First District.

The answer of the Public Service Commission admits these allegations.

The answer of the District Attorney makes no reference whatever to any of them.

The complaint in subdivision VII next avers that; on or about October 29, 1912, the Public Service Commission, under Section 49 of the Public Service Commission Law made an order, hereinafter referred to as the "order of October 29, 1912." A copy is annexed to the complaint. It established, to take effect December 1, 1912, through routes for continuous trips in the same general direction and joint fares for the transportation of passengers between the line in 59th Street and the lines of other street railroads running north and south. The maximum joint fare for such passengers was fixed at five cents. The order required the N. Y. Railways, the C. P. N. & E. R. R. R. [the Belt line did not buy the property of the last named road until 1913], the Third Avenue Railway, the Forty Second Street, Manhattanville and St. Nicholas Avenue Railway, the Second Avenue R. R. and its receiver to put in force and maintain the said through routes and joint rates and, except where through cars were operated, to deliver transfer tickets. The companies enumerated were required, within 30 days from December 1, 1912, to make an agreement as to the portion of each of the joint fares, to which [fol. 130] each of them should be entitled and to notify the Commission on or before January 10, 1913, whether such agreement had been made and what were its terms.

Section 49 authorized the Commission to fix these distributive shares, if the several roads failed so to do by agreement, but such authority was not then exercised because, as the complaint avers, the said roads reached an agreement whereby the C. P. N. & E. R. R. R. received two (2) cents of the joint fare, and the other road participating in the joint rate (which ever one it might be) received three (3) cents of said fare. The ratio between the distance which a through route passenger could travel over the lines other than the 59th Street Line, as compared with the distance such passenger could travel over the 59th Street Line was not less than three to two, which ratio was used in distributing the joint five-cent fare. Upon the succession of the Belt Line to the ownership of the property of C. P. N. & E. R. R. R. it continued the joint service and divided with the other roads on the basis above stated.

The complaint further in this subdivision VII, avers that on October 24, 1919, upon an application of the Belt Line and after a hearing thereon, the Public Service Commission granted permission to that line to discontinue transfers between itself and the Eighth Avenue Line (formerly operated by the N. Y. Railways Company), the Sixth and Amsterdam Avenue Line and the Broadway and Columbus Avenue Line, both operated on Ninth Avenue and both having formerly been operated by the N. Y. Railways Company on the franchise of the Ninth Avenue R. R. Company. Pursuant to this order of October 24, 1919, the through routes be- [fol. 131] tween such lines were abolished and the giving and receiving transfers therefor was discontinued.

The complaint, in said subdivision VII, further avers that thereafter and on February 27, 1920, upon application of the Belt Line, the Public Service Commission authorized the discontinuance of

transfers between the 59th Street Line and the Fourth and Madison Avenues Lines of the N. Y. & Harlem Railroad, which had previously been operated by N. Y. Railways Company. This order became effective on and after March 1st, 1920.

The Complaint then avers that "with the exception of the foregoing changes approved by the Public Service Commission of the State of New York for the first District, your orator has, during the entire time it has operated its street railroad complied and is now complying with said order of October 29, 1912."

The answer of the Public Service Commission admits all the allegations of subdivision VII of the complaint, except that it denies knowledge or information sufficient to form a belief as to the allegation last above quoted, of compliance with the orders of the commission.

The answer of the District Attorney admits the making of the order of October 29, 1912, but denies information or belief as to the residue of this subdivision VII.

The Complaint, in subdivision VIII, next avers that the outstanding capital stock, first mortgage bonds and notes payable by Belt Line represent and were issued for the fair and reasonable market value of its property and are only such as have been authorized and approved by the Public Service Commission under Sec. 55 of Public Service Commissions Law. Exhibits B, C, D and E annexed to the [fol. 132] complaint are orders of the Commission, dated respectively March 19, 1913, July 22, 1913, November 7, 1913, and October 8, 1915, authorizing the issue of stock bonds and notes as follows:

Stock Ex. B	$431,300	
" " C	49,700	
" " D	253,000	
Total Stock		$734,000.
Bonds Ex. B		1,750,000.
Notes " E		73,091.53
Total		$2,557,091.53

The complaint, in said subdivision VIII, further avers that said stock, bonds and notes were issued only for the acquisition of property and the payment of maneys actually advanced for construction after the Commission had determined, upon evidence at hearings, that such property and construction work were of the value of the par of said stock, bonds and notes, aggregating $2,557,091.53; also that the fair and reasonable market value of such property and contruction work, at the time of the issuance of said stocks, bonds and notes (there is in fact only one note $73,091.53 to Third Avenue Railway Company), was not less than $2,557,091.53.

Except for the averment at the beginning of subdivision VIII that the "outstanding stock, bonds and note (now) represent the fair and reasonable market value of the property" of Belt Line, the

answer of the Public Service Commission specifically "admits each and every allegation" contained in said subdivision.

The answer of the District Attorney denies knowledge or informa- [fol. 133] tion sufficient to form a belief as to every allegation contained in said subdivision VIII.

The complaint further sets forth in subdivision IX, the provisions of Statute (Chap. 48, N. Y. Consolidated Laws), requiring the filing of annual and other reports with the Commission, which may prescribe the form and character of said reports, and may require amendments thereof and answers to specific questions, upon which the Commission may need information. Also that the Commission in 1908 prescribed a uniform system of accounts to be observed by street railroad corporations, has prescribed the form and detail of periodic reports to be made by Belt Line and other street railroads, and has from time to time exercised fully the powers of scrutiny and supervision conferred upon it by said Statute. Also that the Commission has constantly exercised supervision over the accounts and books, operating expenditures, finances and transactions of Belt Line, which have been and are under the audit, check and supervision of the Commission and its authorized representatives. Also that the Commission has, from time to time, reported to the Legislature the facts disclosed by the Belt Line.

In this subdivision it is further alleged that the Belt Line has complied with and conformed in all respects to said system of accounts so prescribed and has kept its books and records, including operating details in full compliance with the directions of the Commission; and that complainant's receipts and expenditures and full information regarding its street railroad operations and its business have been and are from time to time, furnished to said Commission as directed or desired by it.

The answer of the Public Service Commission denies knowledge [fol. 134] or information sufficient to form a belief as to these averments of compliance with the Commission's requirements as to the system of accounts and the keeping of books and record, and of the giving of full information from time to time of complainant's operations and business. It expressly admits all the other averments in subdivision IX contained.

The answer of the District Attorney admits merely that the Public Service Commission's Law requires street railroads to file reports and to keep books and records in conformity with a uniform system of accounts established by the Commission.

The complaint, in subdivision X, repeats the averment contained in subdivision VII that Belt Line has been operating its railroad in compliance with the order of October 29, 1912.

Both defendants deny knowledge or information sufficient to form a belief as to this averment.

The complaint next avers, in subdivision XI, that during its operation of the property since March 22, 1913, the cost of carrying each passenger, not including or allowing for any depreciation, or for any interest on bonds or note, or for any return on stock,

has always been in excess of two (2) cents. That the cost including interest on the bonds has been for

Year ended June 30, 1918	3.20 cents.
" " " " 1919	3. "
" " " " 1920	3.46 "
Four months ended October 31, 1920	3.96 "

The details of income from and cost of operations during these periods is alleged to be set forth in Exhibits F, G, H, and I annexed [fol. 135] to the complaint. A further Exhibit J, also annexed to the complaint, is referred to as setting forth a statement of complainant's operations from March 22, 1913, to October 31, 1920, which it is alleged have resulted in losses as follows:

For year ended June 30, 1917	$118,186.36
" " " " " 1918	31,889.31
" " " " " 1920	20,814.82
Four months ended October 31, 1920	28,120.27

It further alleges that the total deficits from operation from March 22, 1913, to October 31, 1920, amounted to $201,270.13, not including depreciation since January 1, 1916, and including the retirements of capital which complainant had been ordered to make by the Commission.

Both answers deny knowledge or information sufficient to form a belief as to these averments.

The complaint further avers, in subdivision XII, that on May 18, 1920, Belt Line filed its petition with the Commission, praying for a modification of the order of October 29, 1912, so that the exchange of transfers between it and the lines operated by all the street railroad companies named in that order (except Third Avenue Railway and Forty-Second Street, etc. Railway) should be discontinued.

Also that on May 22, 1920, Belt Line filed with the Commission, revisions of its Tariff, showing discontinuance of the through routes established by the Order of October 29, 1912, except the two last hereinabove referred to.

It further avers that hearings were had on this petition of May 18, 1920, between May 27, and June 14, 1920, "at which complainant proved the losses from operation above set forth (excepting losses ac- [fol. 136] cruing subsequent to March 31, 1920)." That thereafter on July 9, 1920, the Commission made an order, copy of which is annexed to the complaint as Exhibit K. This order fixed the joint fare for through routes established by the original order of October 29, 1912, at seven (7) cents instead of five (5) cents, effective September 13, 1920. The order further provided that Belt Line, N. Y. Railways Company and its Receiver and Second Avenue R. R. Co., and its receiver should within 30 days after September 13, 1920, agree as to the portion of the joint fares to which each should be entitled and should notify the Commission on or before November 1, 1920, of the terms of such agreement, if made. It further ordered that

supplemental schedules, showing changes in their existing schedules, should be filed by these three roads by September 11, and that not later than September 1, 1920 they should notify the Commission whether the terms of said order were accepted and would be obeyed.

The complaint further avers that on or about July 23, 1920, Belt Line applied to the Commission for a rehearing in respect to the matters determined by the order of July 9; that on November 4, 1920, the Commission made an order granting such rehearing and fixing November 5, 1920 as the date thereof. The order for rehearing provided that the several dates specified in the order of July 9, on or before which any act is authorized or required to be done, be postponed until such dates as may be fixed by the Commission at or after the determination of the rehearing.

It further avers that hearings on such rehearing were had on November 5, and November 10, on which last-named day the matter was finally submitted to the Commission and the case was closed. [fol. 137] Also that the Commission has refused and neglected for more than thirty days to determine the matters submitted on such re-hearings, contrary to the provisions of the Public Service Commissions Law. Also that it has refused to determine the matter submitted on such rehearing and, although requested by complainant, has also refused to permit complainant to do any act authorized to be done or performed by the order of July 9, 1920.

It further avers that the Order of July 9, 1920, is an admission by the Commission that the joint rate of 5 cents was insufficient and that the indefinite postponement of all acts authorized by said order constitute a denial of relief from the Order of October 29, 1912.

The answer of the Commission admits generally the allegations of this subdivision but denies that the Commission has "refused" for more than 30 days to determine the matters submitted on rehearing; that delay for more than 30 days is contrary to Section 22 of the P. S. Commission Act; that the Order of July 9, 1920 is an "admission" of the Commission and that the postponement of decision was a denial of relief.

The answer of the District Attorney is to the same effect.

The complaint, in subdivision XIII, avers that the Order of October 29, 1912, has deprived, is depriving and will continue to deprive the Belt Line of any return whatever upon the reasonable value of its property devoted to street railroad purposes; that it is a violation of Section 10, Article 1, of the Constitution of the United States, in that it impairs the obligation of the complainant's contract with the State of New York; and that it is also in violation of the Fourteenth Amendment to said Constitution in that it deprives Belt Line [fol. 138] of its property without due process of law and denies it the equal protection of the law.

Both answers deny these allegations.

The complaint further avers, in subdivision XIV, that in the event of failure to comply with the Order of October 29, 1912, certain enumerated penalties would result therefrom, and that it has no remedy except in equity.

Both answers deny knowledge or information sufficient to form a belief as to these allegations.

The complaint further, in subdivision XVI, avers that the value of complainant's property involved in this suit exceeds three thousand dollars.

Both answers deny knowledge or information sufficient to form a belief as to this averment.

The answer of the Commission further avers that complainant has an adequate remedy at law, either (a) by mandamus to compel a determination of the matters submitted on the rehearing, or (b) by reviewing said determination by certiorari, or (c) by applying to the Commission, under Section 49, for a general increase in fare over complainant's entire line.

The answer of the District Attorney contains a like averment and also alleges that the Order of October 29, 1912 is no longer in existence having been suspended by the Order of July 9, 1920.

The relief prayed for in the bill is:

1. An adjudication that the Order of October 29, 1912 fixing the joint rate at five cents is illegal because in contravention of the aforesaid constitutional provisions.

[fol. 139] 2. An adjudication that complainant has no adequate remedy at law, and that the resulting injury will be irreparable.

3. Writs of injunction both temporary and permanent against defendants undertaking the enforcement of said Order of October 29, 1912, and the enforcement of any penalties for non-conformity thereto.

As to any and all averments in the complaint which are admitted by the Commission, but denied (on information and belief) by the District Attorney, it is sufficient to say that upon the record before the Master it is found that the admissions made by the Commission were correctly made and the facts asserted in such allegations thus admitted are found by the Master.

The controversy is practically upon the issues raised by the answer of the Commission.

Proceedings in Court

Application for preliminary injunction was made to the U. S. District Court, said Court pursuant to Section 256 of the Judicial Code (Comp. St. Sec. 1233), consisting of Hough, Circuit Judge and Learned Hand and Mayer, District Judges.

The motion was granted January 25, 1921; per curiam opinion stating the facts before the Court and its conclusions therefrom is found in 273 Fed., 272. The injunction issued thereunder restrained any attempt to enforce the Order of October 29, 1912 (except as to joint rates with the Third Avenue and the Forty-second Street, Manhattanville and St. Nicholas Avenue Companies) and the doing of any act or thing interfering with the right of Belt Line to discontinue the carrying out the provisions of such order

(except as above set forth) and from interfering with the right of [fol. 140] Belt Line to exact charge and receive for transportation upon its lines the same rates and fares which it might lawfully exact and charge if the provisions of said Order were not operative.

On June 26th, 1922, the cause again came before the Court for trial, when the following motions were made and disposed of as indicated below:

1. To substitute the Transit Commission as defendant in place of the Public Service Commission.

This motion was granted on consent.

2. To amend the answer of the Public Service Commission by adding a second separate defence, viz: that complainant was incorporated December 24, 1912, which was subsequent to the Order of October 29, 1912; wherefore plaintiff is not lawfully entitled to complain of said order or of any of the results thereof.

This motion was granted on stipulation made in open court that the articles of incorporation of the plaintiff should be deemed a part of the answer.

3. That this defence be heard before the trial of the principal cause.

This motion was granted.

4. To vacate or modify the injunction then in force.

This motion was denied.

5. To dismiss the bill on the pleadings as amended, because

(a) The cause is not within the jurisdiction of this Court.

[fol. 141] (b) The bill fails to state facts sufficient to entitle plaintiff to any equity whatever;

(c) Because plaintiff acquired its properties and undertook their operation, subsequent to the Order of October 29, 1912.

This motion was denied, the Court holding that the matter must be left to final hearing, and the same was referred to the undersigned (as stated supra), "to hear the allegations and proofs of the parties and report to this Court, with all convenient speed, the evidence taken by him, together with his findings and conclusions thereon,"

The brief of the Transit Commission concedes that "the questions of jurisdiction and of the sufficiency of the bill, which were presented by the motion to dismiss, are * * * not before the master." In its brief before the Court on motion to dismiss, it contended that the basic questions of law presented by these motions should be determined before referring any part of the controversy to a master,—the Court having intimated that it contemplated so doing,—so that the scope of the reference should be limited to an inquiry into the additional cost of the transfer service and the additional revenue derived from the transfer passengers.

The Court gave heed to these suggestions and disposed as fol-

lows of all questions of jurisdiction and sufficiency of the bill, upon its denial of the motion to dismiss.

A. That this is not a rate case, and therefore, does not come within the federal jurisdiction as such.

[fol. 142] The Court held that the presumption is that the order complained of was a perfectly proper order. It left to final hearing—that is, in the first instance to the master,—to take testimony and report upon the question whether the times have so changed that the order which was proper in 1912 was confiscatory in 1921.

B. That the complainant, which obtained its incorporation on December 24, 1912, cannot question the Order of October 29, 1912, which went into effect December 1, 1912.

The Court discussed this point and disposed of it adversely.

C. That there is no ground for equitable relief because complainant has an adequate remedy at law, either by certiorari or mandamus.

Although the Court did not discuss this proposition, it is obvious that it disposed of it adversely, because if it were sound, it would be a waste of time to proceed further with the cause. The point raised was a legal one, based upon the averments of the bill as to the action of the Commission. The testimony taken here has not negatived these averments. It appears by the most persuasive evidence, the minutes of the Commission itself, that on the rehearing, "the case [was] closed" on November 10, 1920 (S. M., 47). That the case was not determined within the thirty days, which the statute (Laws of 1907, Ch., 429, Sec. 22), specifies as the period within [fol. 143] which it "shall be determined," is not disputed. It is true that the bill calls this delay a "refusal and neglect," but it is reasonable to presume that it was the lapse of time, not the characterization of it by the draftsman of the bill, which induced the Court's conclusion. The mere circumstance that, during such period the Commission was considering the making of some modifications in the record of what had taken place during the re-hearing is unimportant; there is no suggestion that there was any thought of reopening the closed case.

It will thus be seen that the controversy, upon which the master is to report his findings and conclusions, is not as broad as some of the briefs would seem to indicate. Much testimony, however, was admitted which dealt with portions of the controversy not to be disposed of by him, because it was thought to be the wish of the court that every point in the cause, whether already disposed of or not should be covered by proof taken with opportunity for cross-examination.

Before discussing the testimony, which (when the tabulations are considered) is very voluminous, it may be convenient to state as concisely as possible, what is the specific ultimate issue on which the master is required to report.

The existing situation is this. At no point on its line, other than those at which it intersects or connects with other lines in the Third

Avenue System (of which it forms a part) is the plaintiff now exchanging passengers on a transfer basis with any other street rail-[fol. 144] way. Except in the case of these Third Avenue System transfers, every passenger now boarding one of its cars pays the plaintiff five cents, which it retains, however long or short may be the distance such passenger rides in its car. With like exceptions, to no one of its passengers who has paid it five cents does the plaintiff issue any ticket or token which will enable him to ride some distance, long or short, on another street railway, to which plaintiff pays for so carrying him some part of the five cents its received from him. Nor, with the same exception, does it carry any passenger who gives it merely a transfer slip, from some other road.

The order of October 29, 1912, in controversy, after the modifications made in it on October 24, 1919, and February 27, 1920, above referred to, requires complainant to make such transfers at certain named points with the New York Railways Company and with the Second Ave. R. R. Co.; in other words it requires it to carry passengers who board its cars at such points, with a transfer slip, having ridden to such point on a N. Y. Railways or Second Ave. line, without charging the passenger anything further for carriage on its line. It further requires it to make arrangements with the N. Y. Railways Line and the Second Ave. line, whereby, upon plaintiff's paying something to that line, the passenger will be carried thereon a longer or shorter distance.

The order in other words, requires plaintiff to render an additional service, which because of the injunction it is not now rendering.

The order further provides that as compensation, for rendering such new service, the plaintiff shall receive such proportion of the single fare paid by each passenger, thus riding on the lines of two different companies, as shall be agreed to between them.

[fol. 145] The evidence (S. M., 53 to 59), supports the conclusion that such proportion should properly be fixed to conform to the respective possible mileages which a full ride on each road would give to the passenger. Such proportion is 3 to 2, that is three cents to N. Y. Railways or Second Ave. and two cents to plaintiff. The master does not understand that any one seriously questions the propriety of this proportion: it was at one time submitted to the Commission and not disapproved by it.

The compensation, therefore, provided under the order is two cents for each passenger, whether he began his through journey on the one road or the other, to whom this new service is required to be rendered; and the ultimate issue is whether such compensation for such a service is so small as to make the order confiscatory.

Another circumstance which may be noted is this. In many of the cases of this character, which have come before the courts, the effect of rendering the new service for the prescribed compensation has had to be ascertained from the testimony of persons, more or less familiar with the business, as to what in their opinion would be the result if the service were rendered for the compensation allowed. In

the case at bar, for a certain period, complainant (or its predecessor) did render precisely this required service at precisely this allowed compensation. One might naturally expect that a showing of the results, which did actually happen during this period, would be found more persuasive than the testimony of individuals, however experienced they might be in the operation of railroads, as to what, in their opinion, would happen if the additional service at the allowed com- [fol. 146] pensation, were to be put in practice, as a novel proposition.

Since the testimony, especially the tabulated exhibits, cover several periods of time, in all of which conditions as to transfers were not the same, it will be convenient at the outset carefully to stake out the boundaries of these successive periods.

When the order of October 29, 1912, was made the Central Park N & E. R. company was operating the railroad on 59th Street and on First and Tenth Avenues. The order required it to exchange transfers with the intersecting lines of the Third Avenue system, and it did so. When the Belt Line (itself a part of the Third Avenue system) took over the operation there was no change and no application was made for discontinuance of these transfers.

At all times, therefore, with which this controversy is concerned the Belt Line has exchanged transfers with other lines of the Third Avenue system, the single five cents paid by each passenger (except in the case of the Dry Dock Line) being apportioned between the lines over which he rides.

These transfers are:

At Third Avenue N. and S. on Third Avenue Line.

At Broadway; N. and S. on Broadway Line of Forty-second Street, Manhattanville and S. N. Avenue Ry.

At Tenth Avenue, N. and S. on Tenth Avenue Line of Forty-second Street, M. & St. N. Avenue Ry.

[fol. 147] At First Avenue; S. only on Dry Dock Line.

These transfers with the Dry Dock are, and always have been "free" because the line S. on First Avenue, over which the Dry Dock cars run is understood by both parties to be the property of the Belt Line. They are called "free" because the five cent fare is not apportioned between the two lines, the line that gets it keeps it. In the tabulations an individual passenger who has paid his five cents on the Belt Line (and received a Dry Dock transfer) is enumerated under the heading "5 cent fares." The individual who rides the Belt, upon delivery of transfer issued by the Dry Dock, is enumerated under the heading "Free Transfers," as paying nothing to the Belt.

This group of transfers above enumerated will be hereinafter referred to as "Third Avenue Group" and the Dry Dock transfers specifically as "free transfers."

The order of October 29, 1912 (supra, p. 22) directed the Belt Line to make transfers for single five cent fare both with these lines of the Third Avenue Group and with other lines. That order remained unmodified until October, 1919.

First Period

The first period runs from March 22, 1913, the earliest date given in the tabulations (Exhibit Y) to October 1, 1919 (see amended tariff attached to Exhibit BT). During this period the transfers actually given were:

Third Avenue Group:

At First Avenue, N on line of Second Avenue R. R.
At Second Avenue, N. or S. on Second Avenue R. R.
[fol. 148] At Lexington Avenue, N. or S. on Lexington Avenue Line (N. Y. Railways).
At Madison Avenue, N. or S. on Madison Avenue Line (N. Y. Railways).
At Sixth Avenue, S. on Sixth Avenue Line (N. Y. Rys.).
At Seventh Avenue, S. on Seventh Avenue Line and on Broadway-Seventh Avenue Line (N. Y. Railways).
At Eighth Avenue, N. or S. on Eighth Avenue Line.
At Ninth Avenue, N. or S. on Amsterdam Avenue line and Columbus Avenue Line (N. Y. Railways).

Second Period

This period runs from October 1, 1919, to March 1, 1920, on which date the Order of February 27, 1920, took effect. During this period the transfers actually given were:

Third Avenue Group:

At First Avenue N. on line of Second Avenue R. R.
At Second Avenue N or S. on line of Second Avenue R. R.
At Madison Avenue N. or S. on Madison Avenue line (N. Y. Railways).
At Lexington Avenue N. or S. on Lexington Avenue Line.
At Sixth Avenue S. on Sixth Avenue Line (N. Y. Railways).
At Seventh Avenue S. on Seventh Avenue Line and Broadway & Seventh Avenue Line (N. Y. Railways).

Third Period

[fol. 149] This period runs from March 1, 1920, to February 1, 1921, the preliminary injunction being granted January 25, 1921. During this period the transfers actually given were:

Third Avenue Group:

At First Avenue N. on line of Second Avenue R. R.
At Second Avenue N. or S. on line of Second Avenue R. R.
At Lexington Avenue N. or S. on Lexington Avenue Line.
At Sixth Avenue S. on Sixth Avenue Line (N. Y. Railways).
At Seventh Avenue S. on Seventh Avenue Line and on Broadway-7th Avenue Line (N. Y. Railways).

Fourth Period

This period runs from the date of the injunction to the present time, the tabulations in evidence end, some of them November 30, 1922; others somewhat earlier. During this period the only transfers actually given were: The Third Avenue Group.

Hereinafter the phrase "non-transferable period" will be used to refer to the Fourth Period and the phrase "transfer period" to refer to the Third Period, unless the context indicates that reference is intended to one or other of the earlier periods.

It is obvious that the most helpful comparison will be between the Fourth and the Third Period, because in one of these, the additional service now required by the Commission was not in fact rendered; and in the other it was rendered and was the only additional service then required. In the First and Second periods, still further service was required and rendered; a circumstance which complicates any comparison.

[fol. 150] The Third Period covers eleven months March 1, 1920, to February 1, 1921. By comparing the results of those months with corresponding months in the Fourth period we may get some idea of the effect of the presence or absence of this required service on the use of the road by the different classes of passengers, viz. five-cent, two-cent transfers and free transfers.

From a tabulation submitted by the Commission, covering several years (Ex. D. G.) the figures for the several months are obtained and are here set forth. The tabulation was prepared from the filed reports of the Belt Company.

Third Period (Transfer)

Passengers Carried

	5 cent	2 cent	Free	Total
March, 1920	613,756	693,771	13,853	1,321,380
April, "	614,958	775,650	17,109	1,407,717
May, "	622,678	812,701	24,255	1,459,634
June, "	552,845	778,459	23,689	1,354,993
July, "	507,105	705,425	22,717	1,235,247
Aug., "	469,695	695,036	23,613	1,188,344
Sept., "	523,162	787,642	20,629	1,331,433
Oct., "	602,249	888,904	16,642	1,507,795
Nov., "	590,186	833,561	17,813	1,441,560
Dec., "	643,012	838,543	16,404	1,497,959
Jan., 1921	631,654	825,772	14,626	1,472,052
	6,371,300	8,635,464	211,350	15,218,114
Monthly Average	579,209	785,042	19,213	1,383,465

318565
192701

The corresponding months in the first part of the Fourth Period are

[fol. 151] Earlier Fourth Period (Non-transfer)

	5 cent	2 cent	Free	Total
March, 1921	766,507	494,945	14,052	1,275,504
April, "	756,014	498,485	15,218	1,269,717
May, "	752,468	513,665	15,898	1,282,031
June, "	672,347	486,508	17,879	1,176,733
July, "	596,538	422,555	17,158	1,036,251
Aug., "	569,148	424,067	19,697	1,012,912
Sept., "	636,169	440,759	19,668	1,096,596
Oct., "	715,747	500,611	19,516	1,235,867
Nov., "	719,706	487,300	21,052	1,228,068
Dec., "	750,758	521,395	36,516	1,308,669
Jan., 1922	717,687	486,036	45,541	1,249,264
	7,653,089	5,276,326	242,195	13,171,612
Monthly Average	695,735	479,666	22,017	1,197,419

Comparing these tabulations it appears that the 5 cent group increased from 6,371,300 in the transfer period to 7,653,089 in the corresponding ensuing eleven months of the non-transfer period; an increase of 1,281,789. There can be little doubt that the bulk of these passengers came from the 2 cent group of the earlier period. They had their accustomed N. or S. route with cross-over on 59th Street, and were satisfied to pay the additional 5 cents rather than take the trouble to find some new route. It is difficult to see where else they could have come from. There is no suggestion of any regional conditions tending to increase travel on 59th Street line, a ride beginning and ending on that line. General increase of population will not account for it. The advance estimates of the current census indicate that while the other boroughs have materially increased in population since the last one, Manhattan has remained substantially unchanged.

Deducting these 1,281,789 from the 8,635,464 2 cent group and the 211,350 free group of the transfer period (total 8,846,814) there [fol. 152] would be left 7,565,025. Undoubtedly very many of these were unwilling to pay the additional five cents and by degrees found new routes which would avoid such payment. For many of them such change would be easy; walking a single block would bring them to a line of the Third Avenue system, where they would still get their 59th Street transfer and still appear in the 2 cent group.

The total of 2 cent and free passengers actually carried in the eleven months of the non-transfer period (5,276,326 plus 242,195) was 5,518,521. Apparently then 2,046,504 (7,565,025 minus 5,518,-521) disappeared altogether; the 59th Street line no longer carried them, at 5 cents, 2 cents or free. This is an average of 186,046 per month.

Of these eleven months of the transfer period, nine of them may also be contrasted with the returns for the like months in the later part of the non-transfer period as follows.

Later Fourth Period (Non-transfer)

	5 cent	2 cent	Free	Total
March, 1922.....	728,230	502,462	62,650	1,293,362
April, "	691,649	498,340	44,917	1,234,906
May, "	703,150	511,546	51,436	1,266,132
June, "	637,585	486,320	37,238	1,161,143
July, "	542,281	473,065	15,684	1,031,030
Aug., "	539,434	452,064	32,585	1,024,033
Sept., "	608,514	501,794	22,766	1,133,074
Oct., "	710,095	578,619	15,875	1,304,589
Nov., "	702,639	543,580	21,398	1,267,617
	5,863,577	4,547,790	304,549	10,715,916
Monthly Average	651,508	505,310	33,637	1,190,657

To make such comparison, the figures for the last two months of the earlier table (Period Three, transfer period), must be eliminated, [fol. 153] since the later table contains no figures for December or January. As thus reduced, the footings of the earlier table are:

	5 cent	2 cent	Free	Total
	5,096,634	6,971,149	181,320	12,249,103
Monthly Average	556,292	774,572	20,146	1,361,011

Making the same calculations as before we find the following. The 5 cent group increased from 5,096,634 in the transfer period to 5,863,577 in the corresponding months of the later non-transfer period; an increase of 766,943.

Deducting these 766,943 from the 6,971,149 2 cent group and the 181,320 free group of the transfer period (total 7,152,469) there would be left 6,385,526. But the total of 2 cent and free passengers actually carried in the nine months of the non-transfer period (4,547,790 plus 304,549) was 4,852,339. Apparently then 1,533,185 disappeared altogether; the 59th Street line no longer carried them at 5 cents, 2 cents or free. This is an average of 170,354 per month.

The same exhibit (D. G.) gives the revenue from passengers for each month from January 1, 1918, to November 30, 1922. It is not necessary to transcribe any monthly items here; the tabulations already set forth indicate the seasonal changes, should it become necessary to consider them. The totals of revenue for the different periods are:

Third Period (transfer): Eleven months from March 1, 1920, to January 31, 1921		$491,272.28
[fol. 154] Same Period: Nine months from March 1, to November 30, 1920 (for comparison with nine months of the later transfer period)		$394,254.68
Monthly average	$43,806.07	
Fourth Period (non-transfer): Eleven months from March 1, 1921, to January 31, 1922		$488,180.97
Monthly average	$44,380.09	
Same Period (later part): Nine months from March 1, to November 30, 1922		$384,133.05
Monthly average	$42,681.54	

The complaintant has furnished two comprehensive statements, showing passengers carried, income from passenger revenue, operating expenses, etc., etc.

The first of these (Ex. B. C.) covers the non-transfer period from the date of the injunction February 1, 1921, to September 30, 1922, a period of twenty months. The other exhibit (B. D.) covers a like period of twenty months from February 1, 1919, to September 30, 1920. It was prepared to show the difference in results between (B. C.) operation without giving the transfer required by the modified Order of October 29, 1912, which is the subject of controversy, and operation when giving such transfers (B. D.). In carrying back this Exhibit (B. D.) so far, however, it covers not only the first seven months of the Third Period, but also the entire five months of the Second Period (October 1, 1919, to March 1, 1920), when [fol. 155] transfers were given to the Madison Avenue Line, and in addition eight months of the First Period (February 1, 1919, to October 1, 1919), when transfers were also given to the Ninth Avenue and Columbus Avenue Lines and to the Eighth Avenue Line. The effect of giving transfers to those lines, upon which the present order of the Commission does not require them to be given, is of course reflected in the figures set forth in Exhibit B. D., and there is no way known to the master to el-minate such reflection.

Inspection of the tabulations which have been above set forth shows that, when as a result of the injunction, the charge to transferring passengers from N. Y. Railways and Second Avenue lines was increased to 5 cents, the result was not to increase the total passenger revenue. On the contrary for the eleven months from March 1, 1921, it decreased $3,091.31 ($49,272.28 minus $488,180.97) monthly average $281.02; for the nine months from March 1, 1922, to November 30, 1922, it decreased $10,121.63 ($394,254.68 minus $384,133.05), monthly average $1,132.46 from the amount received in 1920 for the same months The actual result of the change was to decrease the total number of passengers carried; in the first eleven months 2,046,503 (15,218,114 minus 13,171,612); in the nine months of 1922, 1,533,187 (12,249,103 minus 10,-715,916).

It is surely reasonable to assume that an opposite result will substantially follow if the charge to passengers transferring from N. Y. Railway and Second Avenue lines were decreased from 5 cents to 2 cents; that the total revenue will not be decreased, but increased; and that the total number carried will eventually be increased to substantially the extent that the earlier change decreased it, as the [fol.156] old 2 cent passengers, who followed a new N. and S. route with a different cross-over, not as convenient as their old one, but on which they could ride for a single fare, gradually come back.

These statistics have been set out at considerable length, because they seemed helpful towards a conclusion. When the actual results of a transition from a transfer to a non-transfer period are known, they may be found to indicate what may reasonably be expected as the results likely to follow upon a transition from a non-transfer to a transfer period,—making, of course, all proper corrections for any extraneous causes (if such there be), which might affect the result. With these in the record it is possible to view the controversy from a somewhat different angle, with facts instead of opinions or theories to guide one to a conclusion. The real controversy is whether the restoration of the transfers, which were suspended by the injunction will be accompanied by so small a return for the service rendered as to make such requirement confiscatory.

The controversy may properly be called a "rate case," since it presents the question whether the specific remuneration provided for a specific service is, or is not, so insufficient as to be considered confiscatory. But it is not as simple as are many of the rate cases which have dealt with such a problem. A street railway, may maintain and operate its line, carrying the passengers, whose ride begins and ends on its line and who pay for such service a specified uniform amount of 5 cents. Such service may go on for years, satisfying all parties, and then conditions may change and the [fol. 157] revenue received may no longer be sufficient to meet increased cost of maintenance and operation and to pay a reasonable return on the money value of the property, devoted to such service. In such situation application is made to some proper authority,—also it may be to some reviewing authority,—for leave to increase such uniform rate. In such a case, when the proof shows the cost of maintaining and operating the line, the revenue resulting from such operation and the value of the property employed in such service, there is material available for an easy solution of the question.

We have no simple case here. There is no application to increase the uniform rate of charge for the line's own passengers. Moreover it has already undertaken to provide for another group of passengers, to wit, those who come to it from, or go from it to, some other lines of the system to which it belongs; and it further undertakes to carry such group for 2 cents a ride. It is true that it (or rather its predecessor) was, in the first instance, ordered by the Commission to provide for that group and to accept that price; but it has never questioned such order and does not now question it. It is satisfied so far as this record shows, to carry Third Avenue

system transfer passengers at that price, just as it is satisfied to carry its own passengers for 5 cents each, and Dry Dock transfer passengers free.

What it is objecting to is an order to carry still another group of transfer passengers (from lines of N. Y. Railways and Second Ave. R. R.) at the same price as it collects for such service from another group of passengers which it is already carrying. The sole question is: will this additional service (additional to the double [fol. 158] service it already renders,—to its own passengers, and to the Third Ave. transfers) cost so much more to perform, than the revenue obtained from it will produce, as to be confiscatory?

It seems to the master that this is quite a complicated question; not susceptible of being disposed of in the same way as would be the question whether 5 cents was a sufficient rate for carrying its own passengers.

The complainant is already obligated to maintain in proper condition and to operate a railway service for passengers, whom it willingly carries because they are its own, or transfers from the Third Ave. system. There are many of these. For the eleven months from March 1, 1921, to January 31, 1922, it had to carry 13,171,612 of them; for the nine months from March, 1922, to November 30, 1922, it had to carry 10,715,916

What additional expense would it be put to, if the transfers of the Third Period were resumed?

Financial Results of Operation

Next to be considered are the various tabulations showing financial results of operation. All of these, without exception, deal with income and outgo as a whole, that is to say all include results of carrying Belt line passengers; Third Ave. transfers; free transfers and whatever transfers were in force at the time covered by the tabulation. They would probably, be quite sufficient if this were a simple rate case, of the sort referred to supra. But this is not such a simple case. Asking merely to be relieved from giving the additional transfers now ordered, we must start with the assumption that complainant admits that returns for the service now rendered are sufficient to meet all expenses and to leave a surplus which will ensure [fol. 159] a fair and reasonable return on the value of the property. The fact may be quite otherwise; it may be that the Third Ave. system transfers, or the free transfers or both so reduce the amount of income that there is left no such sufficient surplus. But on this record such a result cannot be found; indeed the question whether or not the present returns are sufficient is not presented here. The actual question presented is whether the rendition of the additional service now required by the revised order of October, 1912, temporarily suspended by the injunction, will so substantially reduce the income, or increase the outgo as to change the present satisfactory condition to an unsatisfactory one. We shall, however, get

some light upon this specific question from a study of these tabulations or some of them.

The most comprehensive of these contrasted tabulations are Ex. B C covering twenty months of the Fourth Period and Ex. B D covering twenty months anterior thereto. The amounts of income and outgo are given in each as a lump sum for the whole twenty months. Since the twenty anterior months as shown on B D include the differing conditions of service of the First, Second and Third periods (see pp. 23-25, supra), all lumped together for each separate item of income or outgo, it can hardly be expected that comparing such lump sums with similar ones found in the later twenty months, when conditions of service were uniform would be helpful towards a conclusion as to the specific question here presented. For that reason they are not discussed in this report.

[fol. 160] There are also two tabulations of income (net) from operations, one (Ex. U) for the year ended June 30, 1918, and the other (Ex. V) for the year ended June 30, 1919.

Both of these are wholly within the First Period when more transfers than those ordered in the Third Period were required.

There is another tabulation of income (net) from operations for the year ended June 30, 1920 (Ex. W). This includes three months (July, August and September, 1919), falling in the First Period, five months (October, November, December, 1919, January and February, 1920), falling in the Second Period and four months (March, April, May and June, 1920), falling in the Third Period.

Another similar tabulation (Ex. BE) covers the year ending June 30, 1921. This includes eight months (July 1, 1920, to February 28, 1921 of the Third Period and four months (March, April, May and June, 1921), of the Fourth Period.

Another tabulation (Ex. B. F.) covers the year ended June 30, 1922, which is wholly within the Fourth Period. Since the fewest complications are presented by a comparison of the results of this year, with the one next preceeding a summary of these last two may next be set forth.

It is no doubt the fact that of the tabulation B E (hereinafter called "Statement Year 1921"), one third is in a non-transfer period, but that circumstance, will not vitiate the conclusions drawn from a comparison with BF (hereinafter called "Statement Year 1922"), which covers a period entirely non-transfer. If during the last four [fol. 161] months of Statement Year 1921 the transfers given during its first eight months had been continued, the total of expenditures would have been increased. As a result the shrinkages of expenditures shown by comparison with Statement of Year 1922 would have been greater and the calculations of the additional expense, which would be incurred by a change from non-transfer back to transfer period would be increased. By accepting B E as it is, with no attempt to guess at what it would have been had transfers been the same throughout the whole twelve months, the calculations based on comparison of the two statements are favorable to defendants, since the increased expense is worked out at a smaller sum than in fact it really should be.

Statement Year Ended June 30, 1921

Exhibit BE

Revenues:		
5 cent passengers	8,119,325	$405,936.25
2 cent transfer	7,988,148	159,762.96
Free transfer	239,736	
	16,347,209	$565,729.21
Advertising		$9,174.31
Rent of Buildings and other property		37,664.11
Rent of tracks and terminals		750.00
		$613,317.63
Operating expenses (no allowance for depreciation):		
Maintenance of Way and structures		$99,737.68
Maintenance of Equipment		55,898.11
Power Supply		56,611.71
Operation of Cars		221,968.60
[fol. 162] Injuries to persons & property		39,601.01
General & Miscellaneous Expenses		25,740.98
Taxes		45,783.28
Hire of Equipment		30,249.50
		$575,590.87
Fixed charges:		
Interest Mortgage Bonds		87,500.00
Interest on Notes Payable		3,654.60
Amortization of Bond Discount		2,916.60
Total Operation and Fixed Charges		$669,662.07

In a subsequent tabulation (Ex. BH) the enumeration of revenues in this Statement was amended by adding

"Interest revenue ..... $2,566.13"

This addition makes the total revenues for this year $615,888.76.

Statement Year Ended June 30, 1922

Exhibit BF

Revenues:		
5 cent passengers	8,100,009	$405,000.45
2 cent passengers	5,720,102	114,402.04
Free Transfers	418,988	
	14,239,099	$519,402.49
Advertising		9,228.74
Rent of Bldgs. and other property		46,566.15
Rent of tracks & terminals		750.00
[fol. 163]		$575,947.38
Operating expenses (no allowance for depreciation):		
Maintenance of Way & Structures		$43,789.45
Maintenance of Equipment		38,868.44
Power Supply		36,396.97
Operation of Cars		168,841.91
Injuries to Persons & Property		25,970.12
General & Miscellaneous Expenses		25,111.42
Taxes		47,820.98
Hire of Equipment		28,527.60
		$415,327.07
Fixed charges:		
Interest on Mortgage Bonds		87,500.00
Interest on Notes Payable		4,538.30
Amortization of Bond Discount		2,916.60
Total operation & fixed charges		$510,281.97

In a subsequent tabulation (Ex. BH), the enumeration of revenues in this statement was increased by adding "Interest revenue $4,579.59."

This addition makes the total revenue for this year 1922, $580,526.97.

There was also included under "operating expenses" an item of $47,192.55 for "depreciation," making the total of such expenses for the year $462,519.62. Depreciation is a proper charge against income.

Counsel for defendants object to the deduction on these statements, for the fiscal years 1921 and 1922, of items of fixed charges, being interest on the bond and notes, issue of which was approved by the Commission. The method of calculation adopted by the master renders it unnecessary to discuss this objection.

[fol. 164] These two yearly statements may next be examined to ascertain what changes in amount of income or outgo should be

expected to result if the exchange of transfers which the preliminary injunction suspended were resumed.

As was said before, it is reasonable to conclude that, if a discontinuance of these transfers resulted in the disappearance of a large number of passengers, the resumption of such transfers would result in the return of substantially the same number of such passengers or of others in their place. There is nothing in the record (the theories of one of the witnesses as to experiences in Brooklyn have not been overlooked), to negative such a conclusion. Those, who left when the transfers ceased, did not all leave at once; it took them some time to find another route, less expensive but may be also less convenient, as the eleven-months and nine-months tabulations (supra pp. 26-29) indicated. Similarly they would not all come back at once; but, when the old convenient service with transfer at single 5 cent fare was resumed, they would gradually return to avail of it.

Also it seems reasonable to conclude that if the elimination of a certain number of passengers made it less expensive to operate the road, the return of a like number would make the operation of the road cost as much as it did before they left.

Looking first at the revenue side of these two yearly statements 1921 and 1922, we find a shrinkage in the number of passengers carried of 2,108,110; a monthly average of 175,675. Also a shrinkage in the passenger revenue of $46,326.72; a monthly average of [fol. 165] $386.06. These averages do not agree with those found when the earlier eleven months and the later nine months of the non-transfer period were compared with similar months in the third period (supra, pp. 26-29). This is partly because the figures for the year ended June 30, 1921, include 8 months of the transfer and 4 months of the non-transfer period; partly also because seasonal variations in the requirements of passengers affect tabulations which do not include a whole year.

This amount, $46,326.72 added to the revenues of 1922 (which, with the $4,579.59 of interest revenue was $580,526.97) would make a total revenue of $626,853.69.

To what extent should it be concluded that the operating expenses of the year 1922, $462,519.62 will be increased by the resumption of the service when the injunction suspended? The circumstances that, by reason of the lapse of time between the granting of the injunction and the trial of the case, there has been a period of several months' operation without transfers to compare with a similar length of operation with transfers makes it much simpler to find an answer to this question.

Taking up the various units of expense we have:

Maintenance of way & structure:

It is as necessary to keep the road bed, rails, conduit, ducts, cables, etc., in good condition at all times for the transportation of 14,000,000 of passengers as it would be were 16,000,000 carried. It is no doubt true that an increase of car miles run off and an increase of load carried would have some effect in the way of increasing wear and tear [fol. 166] and thereby making it necessary to spend more money

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to keep the way in perfect order; but there is no way known to the master by which such increase can be expressed either in specific amounts or percentages. For that reason, no increased cost can be found under this head.

Maintenance of equipment:

It is obvious that an increase in car mileage and in total load will increase the cost of keeping the cars and other equipment that moves this load in fit condition at all times. For the year 1921, when the road was carrying 16,000,000 passengers that cost was $55,898.11; for the year 1922 when it was carrying 2,000,000 passengers less, that cost was $38,868.14. The difference is $17,029.97. The accounts are kept in conformity with the system prescribed by the Commission (S. M., 18); there is no contention that the entries in the books are inaccurate, or that the summaries set out in the various exhibits do not accurately represent those entries. There is no proof of any other cause operating to produce this decrease. Defendants refer in their briefs to a statement of the auditor (Farrington) that there had been a decrease in the cost of labor and materials and particularly of 10% in the wages of motormen and conductors, but it will be seen that this witness was being interrogated in connection with the figures on Ex. B P (S. M., 163, 165), which compared the statistics of a period from February 1, 1919, to September 30, 1920, with a period from February 1, 1921, to September 30, 1922. Neither the auditor, nor any one else, testified that there had been a reduction of the cost of materials or of labor, or of wages of motormen and conductors, [fol. 167] subsequent to the year ended June 30, 1921. And it is between that year and the year ended June 30, 1922, when 2,000,000 less passengers were carried, that there was the decrease of cost shown under this heading and also the decrease under the heading "operation of cars" hereinafter considered.

The conclusion is reached that with the additional service which the resumption of these transfers will require the expense of maintaining equipment will be increased, in round numbers $17,000.

Power supply:

For the year ended June 30, 1921, the amount paid for power was $56,611.71; for year ended June 30, 1922, it was $36,396.97. The difference is $20,214.74.

This seems a large shrinkage,—over 35%. The passenger shrinkage (2,000,000), is only 12½% of the 16,000,000 carried in the earlier year. The 2,000,000 passengers average 166.666 a month, or 5,555 a day. Obviously it would require a substantial increase of car mileage to carry them and that would require a substantial increase of power. But the situation, as the testimony shows, involves more than that. When a loaded car is slowed down, with power cut off, but moving still under its own momentum a small increase of power will speed it up. If, however, the loaded car be at rest, it will require a greater expenditure of power to overcome its inertia and set it again in motion. That is what takes place

every time a car is stopped to let off and take an passengers. The testimony indicates that the conditions under which these additional 2,000.000 passengers were carried were such as to require a large expenditure of power, aside from a mere increase of car mile-[fol. 168] age. The road had nearly reached saturation point; it was possible to put on a few new cars but the result would be congestion and slowing down of the entire service. The traffic regulations at the intersection of such thoroughfares as 5th Ave. and Broadway caused many full stops. There was traffic congestion at the end of the line, because 59th Street, a one-way east-bound street, was the approach for the heavy traffic over Queensborough Bridge. Traffic regulations which required the parking of motor cars, south of Central Park with rear-end to the curb made it impossible for a vehicle to pass between a Belt line car and the head-ends of the motor cars, so such vehicles west-bound had to stick to the tracks.

These figures as to power supply in the two successive years are an unexpected but very strong corroboration of the testimony as to the difficulties with which the Belt line will have to contend, should it undertake to provide car mileage to carry the additional 2,000,000 passengers which resumption of these transfers will presumably bring to it.

The conclusion is reached that for the additional service, which resumption of the transfers will require, the expense of power supply will be increased, in round numbers $20,000.

Operation of cars:

The statement year 1921, gives the cost of this as $221,968.60; the statement year 1922, as $168,841.91. The difference is $53,127.69.

The great bulk of this charge is for wages of motormen and conductors. The small amount for a few employees located in the office, so far as appears, remained constant throughout both years. [fol. 169] The shrinkage was undoubtedly the result of decreased car mileage; increased car mileage to a like extent will restore the charge to what it was before. The conclusion is reached that the cost of providing adequate service, when transfers are resumed, will involve an additional cost of operation of cars amounting in round numbers to $53,000.

Injuries to person and property:

The statement year 1921, gives this as $39,601.01; the statement year 1922, as $25,970.12. The difference is $13,630.39.

Obviously if the number of passengers carried is decreased by 2,000,000 there will be just so many less who may chance to meet some accident when getting on or off, or to be thrown when inside, by sudden start or stop. So too decreased mileage decreases the chance of collision with other vehicles. The decrease shown by comparison of these two statements is what one might reasonably expect; and it seems reasonable to assume that a resumption of the old conditions will show a similar increase.

The conclusion is reached that the increase of passengers and car mileage caused by resumption of these transfers will involve an increased cost for injuries to persons and property amounting in round numbers to $13,600.

Taxes:

The giving or not giving of transfers in no way affects the amount of real estate or franchise taxes. Any increase in gross receipts from passengers involves a tax of 5% on such increase. Since the conclusion has been reached that the giving of these transfers will [fol. 170] result in a yearly increase of passenger revenue in the amount of $46,326.72, the further conclusion is reached that 5% tax on said amount, in round numbers $2,300, should be added to expenditures.

Other items on the list of expenses involve no substantial change and need not be considered.

The aggregate of these items of increased expense is

Maintenance Equipment	$17,000
Power Supply	20,000
Operation of Cars	53,000
Injuries to Persons and Property	13,600
Taxes	2 300
	$105,900

The brief for the Commission refers to the fact that upon cross-examination the Auditor referring to the several items of expenditure which have been discussed supra, stated that he could not tell whether or not the giving or refusing of transfers would have any effect upon their amount. The testimony is unimportant; perhaps if the witness had been set to study the figures as the master has, he might have given a different answer.

Restating the conclusions above set forth, taking the last fiscal year, ended June 30, 1922, as a basis and making the additions or reductions, which the testimony indicates should be made as a result of the resumption of these transfers in controversy, it is found:

That to the total revenue, when operating without transfers, viz., $580,526.97, there should be added $46,326.72, making a total revenue of $626,853.69.

[fol. 171] That to the total expenses, when operating without transfers, viz., $415,327.07, there should be added $105,900, making a total of $521,227.07.

The difference between $105,900 and $46,326.72, is in round numbers $59,500. When the facts show quite conclusively that the result of the injunction which discontinued these single 5-cent fare transfers, was not merely to decrease passenger revenue $4[illegible],000, but also to reduce the cost of carrying the passengers by $105 900, it is difficult to find any foundation for the proposition advanced in the brief of one of the defendants, that "the injunction order was financially detrimental to the complainant."

Valuations

The conclusions to which we have been led by an analysis of the statistics heretofore discussed make it unnecessary to go at any length into an analysis of the testimony as to valuation. The defendants called no witness as to the value of the property, confining their briefs to criticism of the testimony on that subject introduced by complainant.

The property, real estate, tracks, structures, equipment, etc., of the C. P. N. & E. R. R. Co., predecessor of complainant, was sold November 14, 1912, to Cornell and his associates, for $1,673,000 subject to taxes amounting to $397,406.27, making the total purchase price $2,070,406.27. Defendants concede that this is "some evidence" of its value at the time; since the sale in foreclosure was at auction after public advertisement, the master finds it quite persuasive evidence [fol. 172] of the market value at the time of sale. The property at that time included the two N. and S. lines known as East Belt and West Belt, both since abandoned. These two lines were not of the expensive slotted electric conduit type existing on the 59th Street line, but were merely the old horse car tracks adapted for use by storage battery cars. The amount of property was increased, from time to time, by the purchase of additional equipment, which purchases were authorized as capital expenditures by the Commission. Among these items there were included 79 storage battery cars of which 26 are still owned by complainant.

With the express sanction and authorization of the Commission complainant issued the following bonds, stock and note, which constitute its capitalization.

First mortgage 5 per cent bonds pursuant to order of the Commission March 19, 1913, Ex M.....	$1,750,000
Capital stock pursuant to three orders of the Commission made in 1913, Exs. M, N, and O.....	734,000
Note, pursuant to order of the Commission October 8, 1915, Ex. P.....	73,091.53
Total.....	$2,557,091.53

John H. Madden, a thoroughly competent valuation engineer, was called by complainant. He testified that he was retained by the Commission in May, 1921, to make a valuation of all street railway and rapid transit railroads in Greater New York, including this Belt line. In the course of this work, witness made estimates of the valuation of its property as of June 30, 1921. These estimates were [fol. 173] on three separate theories, viz., cost of reproduction as of that date; cost of reproduction on price basis of 1910-1914; original cost less accrued depreciation. His report to the Commission had not yet been acted upon by it, and these valuations were in no sense expressive of the opinion of the Commission, nor were they offered as such. The witness testified before the master, to his individual conclusions from the examination he had made, pointing out in detail

some corrections and modifications, which he thought should be made in his original estimates as submitted to the Commission. He testified (S. M., 114), that the report he made, with those modifications, was a correct expression of his honest opinion as to the valuations included in it, on each of the three bases.

He testified that his valuation of the entire property, irrespective of land owned by the Belt, based on average prices of the first six months of 1921 was (S. M., 116) $2,859,754. From this he deducted as "depreciation, for reasons stated (S. M., 117, et seq.)" $128,246. This would reduce the estimate to $2,731,508, which would be further reduced by the exclusion (S. M., 106) of .31 of a mile of single track storage battery type; also a further reduction of about $77,000, for correction of errors in witness' inventory (S. M., 137). Witness did not include any properties which had been abandoned prior to June 30, 1921 (S. M., 130). The E. Belt Line was abandoned June 9, 1919; the W. Belt March 24, 1921.

The land, which Madden did not value, not being a real estate expert, was valued by Irvin Ruland, a qualified expert, who testified before the master (S. M., 350), at $531,000.

[fol. 174] Upon cross-examination Madden testified that he (and his assistants) examined all books and records of the company to ascertain the actual expenses of original construction, making also other investigations as to prices prevailing at the time to determine whether or not it had paid excessive prices (S. M., 125).

For convenience in the examination of witnesses, and not as evidence introduced by either side (S. M., 255), the printed report of Madden and others as made to the Commission before any revisions and still under advisement before the Commission was marked Ex. BS.

The witness further testified that in his opinion a valuation based on cost of reproduction was improper and that "the proper base for the valuation of these properties was * * * on the original cost basis and from that to penalize the company with the amount estimated as the expenditure necessary to put the property in first class operating condition."

He did not testify to any figures on this basis of valuation, but reference to the Report Ex. BS shows that it gave:

Original Cost	$803,450
Accumulated depreciation	226,515
Cost less depreciation	$576,935

This is exactly $45,935 in excess of what the real estate expert testified, without contradiction, to be the present value of the bare land at 54th Street and 10th Avenue. The witness' selection of the word "penalize" in this connection seems quite apt, in view of the circumstance that this same property, with the addition only of the two belt horse car lines, shortly before complainant acquired it, sold [fol. 175] in the open market for upwards of $2,000,000 on the

strength of which the Commission authorized the issue of $1,750,000 bonds upon the security of such property.

An objection was made by defendant to the witness Madden's valuation to the effect that as to some of the items of track and structure included in it there was no proof of title. That objection seems to be sufficiently disposed of by the deed from Cornell to complainant, Ex. D and by Sec. 4 of Chap. 511, Laws of 1860. Even if these individual items were rejected their total would not affect the result.

In addition to Madden the complainant called Ryder, Engineer of Way for the various companies comprising the Third Avenue system. He qualified himself to testify as to the valuation of railway properties of this sort, although he had not made any such valuations "for rate making purposes." S. M., 380. It does not seem to the master that a witness who is competent from training and experience to give an estimate of what it would cost to build a railway at some particular date, ceases to be competent to give a court such estimate, merely because the cause in which he is being examined is concerned more or less closely with the rate of fare to be charged passengers upon such railway. This witness described in detail the track construction (exclusive of ducts) of the Belt Line on 59th Street from First to Tenth Avenues, and on Tenth Avenue, from 59th Street to 54th Street. S. M., 381, 382. His estimate of the cost of reproducing that track structure at the present time was $1,124.000 from which there should be deducted for depreciation $271,000 (S. M, 383), [fol. 176] leaving $853,000. Cross-examination has not induced any substantial modification of these figures.

Walter J. Quinn, electrical engineer of the Third Avenue System, testified (S. M., 397) as to the cost, at the present time, of reproducing ducts and feeders for the Belt Line, through 59th Street from First to Tenth Avenues and down to 54th Street. He estimated it to be

Ducts	$163,687.00
Feeder Cables	45,421.00
	$209,108.00

This did not include any overheads, although in the opinion of the witness they should be included. Subsequently the witness Ryder gave an estimate (S. M., 407), of overheads, covering reproduction of track and roadway, ducts and feeders, as $280.000. The master finds that overheads should be included, but that this estimate might perhaps be somewhat reduced; it would be a waste of time to discuss details, the reduction would in no way affect the result of this hearing.

Cross-examination of Quinn did not indicate any reduction of his figures for reproduction. It did appear that some of these ducts were larger in capacity than is now required for the operation of the Belt Line itself; they accommodate cables used to transmit power to other lines, which years ago were all operating in a single system. No calculation is made as to the amount of possible reduction for that reason; the amount would not affect the result.

The car barn at 54th Street and Tenth Avenue is larger than the present necessities of this road require. The space not occupied in [fol. 177] the operation of the Belt is rented out to others and the rent received, between $30,000 and $40,000, is included with operating income.

The master has not been able to appreciate why defendants are so insistent upon having the valuation of this real estate confined to so much of it only as is used for operation of the road. It seems to him that if it were so distributed the result might not be quite what counsel seem to expect. Using round numbers the whole value of the real estate is $500,000 and the rentals received from outside occupants, say $30,000, are now carried to income from operation, making the net income just so much greater than it otherwise would be. It is from this net income that the fair and reasonable return on the value of the property which is rendering the service is to be obtained. Let us assume that only three-fifths of this real estate is occupied for railroad purposes that therefore three-fifths only of this value is to figure in the total valuation. In that event the remaining two-fifths represents an investment of the company in real estate in no ways connected with its operation of a railroad and, therefore, its value and the income derived from it would seem to be no concern of the Commission, when engaged in fixing a rate of fare on the basis of a fair return on the value of the property employed directly or indirectly in carrying the passengers who pay the fare.

That being so, the rental ($30,000) received from this outside non-railroad operating investment can no longer logically be carried to income from operation of the railroad under the Company's franchise; and the net income each year will be $30,000 less.

In other words the valuation of the property which is to receive [fol. 178] the return is decreased by $200,000; while at the same time the net income from which that return is to be made is decreased by $30,000 which is sufficient to pay interest at 6% on $500,000.

Under this method of calculation a rate-making order would reach the confiscatory level, sooner than it would under the one here followed.

Conclusions

Taking the year ended June 30, 1922, as a basis and assuming rates of fare and transfer to continue as they have since the injunction we would have

Revenue	$580,526.97
Operating Expenses	415,327.07
	$165,199.90

In round numbers $165,200 is 6% of $2,753,333.

Defendants called no witness to testify to a valuation of the property. The most comprehensive valuation we have is that of Madden which included everything except the land at Tenth Ave. and 54th Street, on which the car barn stands. His valuation was

$2,859,754, less a depreciation of $128,246, giving a net, less depreciation, of $2,731,508. From that he further deducted $77,000 to cover errors in his inventory which would bring the valuation to $2,654,508. He also deducted the cost of reproduction or .31 of a mile of storage battery tracks. How much that is in dollars and cents, nowhere appears, but if we take the valuation in round numbers at $2,600,000, we shall certainly cover it and whatever other small points of criticism there may be.

As the record of the testimony stands, it would seem clear that [fol. 179] the value of the land ($531,000) should be added to this. The master, however, is included to believe that the witness Madden's reiteration of the statement that the valuation of the land was not included in his valuation means merely that he did not himself go into the question of valuation of real estate, but accepted the figures of Mr. Ruland and that the figures of Ruland's valuation appear in Madden's total of $2,600,000 to which it has been here reduced.

If the mere inclusion of Ruland's figures in this amount of $2,600,000 or their addition to it at all affected the final conclusion on the crucial question before the Master, he would re-open the cause and have the obscurity removed. It will, however, be obvious from the ensuing conclusions, that such a course is not necessary. There is no question here as to whether or not any orders requiring the service rendered during the Fourth Period in which transfers were exchanged only with the lines of the Third Avenue System, are confiscatory.

Six per cent of $2,600,000 is $156,000.

Should the order of October 29, 1912, directing transfers for single 5 cent fares with the New York Railways and the Second Avenue Lines, as set forth in the Third Period (supra, pp. 24, 25) be put in force, we would have

Revenue	$626,853.69
Expenses of Operation	521,227.07
	$105,626.62

This sum $105,626.62 is 6% of $1,760,443.

The net revenue from operation, with transfers and rates in force [fol. 180] as they were in the Third Period ($105,626.62) would not provide a fair and reasonable return upon the value of the property invested in such operation.

So much of the Order of the Commission of October 29, 1912, as requires complainant to exchange transfers, for a single 5-cent fare with the lines of the Second Avenue R. R. Co. and of the New York Railways Co. at First Avenue, Second Avenue, Lexington Avenue, Sixth Avenue, and Seventh Avenue is confiscatory.

Apparently the Commission on July 9, 1920, reached a similar conclusion. Had they not done so, they surely would not have required passengers who were paying five cents for these transfers to pay seven cents.

The stenographer's minutes are filed with this report; the exhibits have been or will be returned to counsel.

Respectfully submitted, E. Henry Lacombe, Master.

May 25, 1923.

[fol. 181] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS OF DEFENDANT TRANSIT COMMISSION TO MASTER'S REPORT

The defendant Transit Commission hereby makes and files the following Exceptions to the Report of Hon. E. Henry Lacombe, Special Master herein, dated May 25th, 1923, and filed on that day in the office of the Clerk of this Court.

1. It excepts to the finding or conclusion of the Master that so much of the Order of the Commission of October 29th, 1912, as requires complainant to exchange transfers, for a single five cent fare, with the lines of the Second Avenue Railroad Company and of the New York Railways Company at First Avenue, Second Avenue, Lexington Avenue, Sixth Avenue and Seventh Avenue, is confiscatory, on the ground that such finding or conclusion is unsupported by evidence, is contrary to the evidence, and is against the weight of the evidence.

2. It excepts to the finding or conclusion of the Master that the Commission on July 9th, 1920, reached a similar conclusion, upon the same grounds, and also upon the ground that a ruling of the Commission in July 1920 that the Order of October 29th, 1912 was unreasonable at the time of such ruling is wholly irrelevant to the issue whether such Order is confiscatory at the present time.

[fol. 182] 3. It excepts to the finding or conclusion of the Master that complainant's net revenue from operations with transfers and rates in force as they were in the period from March 1st, 1920, to January 31st, 1921, would not provide a fair and reasonable return upon the value of the property invested in such operation upon the ground that such finding or conclusion is unsupported by evidence, is contrary to the evidence and is against the weight of the evidence.

4. It excepts upon the same grounds to the finding or conclusion of the Master that the proportion of a single fare for a ride upon the road of the complainant and upon the line of either the New York Railways Company or the Second Avenue Railroad Company should be fixed to conform to the respective possible mileage which a full ride on each road would give to the passenger, and that such proportion is three cents to New York Railways Company or Second Avenue Railroad Company and two cents to complainant.

5. It excepts upon the same grounds to the finding or conclusion of the Master that the compensation to complainant provided under the Order of October 29th, 1912, is two cents for each passenger, and to the failure of the Master to find that complainant voluntarily assumed the obligation to perform the service required by such Order for such compensation.

6. It excepts upon the same grounds to the finding or conclusion of the Master that general increase of population will not account for any increase in travel on the 59th Street Line.

7. It excepts upon the same grounds to the finding or conclusion of the Master that the return of a number of passengers previously eliminated would make the operation of the road cost as much as it did before they left.

8. It excepts upon the same grounds to the findings or conclusions of the Master and separately to each of them that with the additional service which the resumption of Transfers would require the expense [fol. 183] of maintaining equipment would be increased in round numbers $17,000, the expense of power supply would be increased in round numbers $20,000, the cost of operation of cars would be increased in round numbers $53,000, the cost for injuries to persons and property would be increased in round numbers $13,600, the net amount of taxes would be increased in round numbers $2,300, and the total expenses of operation would be increased in round numbers $105,900.

9. It excepts on the same grounds to the finding or conclusion of the Master that there is no proof of any cause (other than the decrease in number of passengers) to produce the decrease in expense of maintenance of equipment in the year 1922 as compared with the year 1921.

10. It excepts to the failure of the Master in the computations referred to in the Eighth Exception to make proper or any allowance for the decrease in cost of labor and materials shown by the evidence and to the Master's assumption that such decrease was not subsequent to June 30th, 1921.

11. It excepts to the failure of the Master in the computations referred to in the Eighth Exception to make proper or any allowance for the decrease in expenses due to the discontinuance of the West Belt Line on March 24th, 1921, as shown by the evidence.

12. It excepts to the finding or conclusion of the Master that the decrease in cost of operation of cars after the injunction was due to decreased car mileage caused by the discontinuance of transfers and to the failure of the Master to find that any decrease of mileage was caused by the abandonment of the West Belt Line and that the mileage operated on the 59th Street Line was substantially the same after the discontinuance of transfers as before.

13. It excepts to the failure of the Master in his computation of the increase in the net amount of taxes which he finds would be caused by a resumption of the transfers to allow for the deduction of any increase in the 5% tax on gross receipts from the amount of [fol. 184] the special franchise tax as provided by law.

14. It excepts upon the grounds heretofore stated to the finding or conclusion of the Master that the result of the injunction was to reduce the cost of carrying the passengers by $105,900.

15. It excepts upon the same grounds to the finding or conclusion of the Master that the fair value of complainant's property invested in its Railroad operations is in round numbers $2,600,000, and to each and every of the items found by the Master upon which such valuation is based and to the basis of such valuation.

16. It excepts upon the same grounds to the finding or conclusion of the Master that should the Order of October 29th, 1912, directing the exchange of transfers for single five cent fares with the New York Railways Company and the Second Avenue Railroad Company be put in force the expenses of operation would be $521,227.07 and the surplus of revenue over expenses of operation would be only $105,626.62.

17. It excepts to the failure of the Master to hold that the burden of proof is upon the complainant upon every issue in the case and especially to establish the confiscatory character of the Order of October 29th, 1912, and to establish that the decrease in expenses of operation since the injunction herein is due to the discontinuance of transfers and not to other causes.

18. It excepts upon the grounds heretofore stated to the finding or conclusion of the Master that the Commission failed to decide the rehearing before it within thirty days from the time when it was finally submitted.

19. It excepts to the failure of the Master to find that the result of the discontinuance of the transfers has not been to benefit the complainant, but has been to benefit the Third Avenue Railway Company by diverting transfer traffic to its Lines from the Lines of the New York Railways Company and the Second Avenue Railroad Company.

20. It excepts to the failure of the Master to find that the Order [fol. 185] of October 29th, 1912, is not confiscatory at the present time, but is a reasonable service regulation.

21. It excepts, upon the grounds heretofore stated, to the finding or conclusion of the Master that the resumption of the transfers would increase the expenses of operation in round numbers $59,500 more than it would increase the passenger revenue.

22. It excepts to the failure of the Master to find that a resumption of the transfers would increase the passenger revenue as much as or more than it would increase the expenses of operation.

23. It excepts upon the grounds heretofore stated to the findings or conclusions of the Master that the amount of depreciation to be deducted in estimating the value of complainant's property was $128,246 and that the valuation of the entire property based on average prices during the first six months of 1921 was $2,859,754, and that after deducting depreciation the valuation would be $2,731,-508.

24. It excepts to the use by the Master of any estimate of value based upon prices during the first six months of 1921.

25. It excepts to the finding or conclusion of the Master that Exhibit B. S. gave as the original cost of complainant's property $803,-450, as accumulated depreciation $226,515 and as original cost less depreciation $576,935, upon the ground that said figures in Exhibit B. S. relate to only a part of complainant's property, and that said Exhibit was not admitted as evidence of any facts.

26. It excepts upon the grounds heretofore stated, to the finding or conclusion of the Master that the witness Ryder was qualified to testify to the valuation of Railway properties of the kind involved in this case.

27. It excepts to the acceptance by the Master of the testimony of the witness Ryder as to the cost of reproducting complainant's track structure upon the ground that it appeared from the testimony of [fol. 186] said witness that the unit prices used by him in making his estimate were based upon hearsay and not upon personal knowledge or experience.

28. It excepts to the finding or conclusion of the Master that the valuation of complainant's property would not be affected by excluding therefrom the value of certain items of track and structure, as to which defendants objected that complainant had failed to prove title, the value of ducts in excess of the capacity required for complainant's operations, and the value of .31 of a mile of storage battery tracks not belonging to complainant.

29. It excepts to the failure of the Master to find that the conduct of the complainant as shown by the evidence disentitles it to any equitable relief.

Dated, June 12th, 1923.

George O. Redington, Counsel to Transit Commission. George H. Stover, Assistant Counsel. Howard Thayer Kingsbury, Special Counsel.

[fol. 187] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS OF DEFENDANT EDWARD SWANN TO MASTER'S REPORT

The defendant Edward Swann, hereby makes and files the following Exceptions to the Report of Hon. E. Henry Lacombe, Special Master herein, dated May 25th, 1923, and filed on that day in the office of the Clerk of this Court.

1. It excepts to the finding or conclusion of the Master that so much of the Order of the Commission of October 29th, 1912, as requires complainant to exchange transfers for a single five cent fare with the lines of the Second Avenue Railroad Company and of the New York Railways Company at First Avenue, Second Avenue, Lexington Avenue, Sixth Avenue and Seventh Avenue, is confiscatory, on the ground that such finding or conclusion is unsupported by evidence, is contrary to the evidence, and is against the weight of evidence.

2. It excepts to the finding or conclusion of the Master that the Commission on July 9th, 1920, reached a similar conclusion, upon [fol. 188] the same grounds, and also upon the ground that a ruling of the Commission in July 1920 that the order of October 29th, 1912, was unreasonable at the time of such ruling is wholly irrelevant to the issue whether such order is confiscatory at the present time.

3. It excepts to the finding or conclusion of the Master that complainant's net revenue from operations with transfers and rates in force as they were in the period from March 1st, 1920 to January 31st, 1921, would not provide a fair and reasonable return upon the value of the property invested in such operation upon the ground that such finding or conclusion is unsupported by evidence, is contrary to the evidence and is against the weight of evidence.

4. It excepts upon the same grounds to the finding or conclusion of the Master that the proportion of a single fare for a ride upon the road of the complainant and upon the line of either the New York Railways Company or the Second Avenue Railroad Company should be fixed to conform to the respective possible mileage which a full ride on each road would give to the passenger, and that such proportion is three cents to New York Railways Company or Second Avenue Railroad Company and *tow* cents to complainant.

5. It excepts upon the same grounds to the finding or conclusion of the Master that the compensation to complainant provided under the order of October 29th, 1912, is two cents for each passenger, and to the failure of the Master to find that complainant voluntarily assumed the obligation to perform the service required by such Order for such compensation.

6. It excepts upon the same grounds to the finding or conclusion of the Master that general increase of population will not account for any increase in travel on the 59th Street Line.

7. It excepts upon the same grounds to the finding or conclusion of the Master that the return of a number of passengers previously eliminated would make the operation of the road cost as much as it did before they left.

[fol.189] 8. It excepts upon the same grounds to the findings or conclusions of the Master and separately to each of them that with the additional service which the resumption of transfers would require the expense of maintaining equipment would be increased in round numbers $17,000 the expense of power supply would be increased in round numbers $20,000 the cost of operation of cars would be increased in round numbers $53,000 the cost for injuries to persons and property would be increased in round numbers $13,000. the net amount of taxes would be increased in round numbers $2,300 and the total expenses of operation would be increased in round numbers $105,900.

9. It excepts on the same grounds to the finding or conclusion of the Master that there is no proof of any cause (other than the decrease in number of passengers) to produce the decrease in expense of maintenance of equipment in the year 1922 as compared with the year 1921.

10. It excepts to the failure of the Master in the computations referred to in the Eighth Exception to make proper or any allowance for the decrease in cost of labor and materials shown by the evidence and to the Master's assumption that such decrease was not subsequent to June 30th, 1921.

11. It excepts to the failure of the Master in the computations referred to in the Eighth Exception to make proper or any allowance for the decrease in expenses due to the discontinuance of the West Belt Line on March 24th, 1921, as shown by the evidence.

12. It excepts to the finding or conclusion of the Master that the decrease in cost of operation of cars after the injunction was due to decreased car mileage caused by the discontinuance of transfers and to the failure of the Master to find that any decrease of mileage was caused by the abandonment of the West Belt Line and that the mileage operated on the 59th Street Line was substantially the same after the discontinuance of transfers as before.

13. It excepts to the failure of the Master in his computation of [fol. 190] the increase in the net amount of taxes which he finds would be caused by a resumption of the transfers to allow for the deduction of any increase in the 5% tax on gross receipts from the amount of the special franchise tax as provided by law.

14. It excepts upon the grounds heretofore stated to the finding or conclusion of the Master that the result of the injunction was to reduce the cost of carrying the passengers by $105,900.

15. It excepts upon the same grounds to the finding or conclusion of the Master that the fair value of complainant's property invested in its Railroad operations is in round numbers $2,600,000, and to each and every of the items found by the Master upon which such valuation is based and to the basis of such valuation.

16. It excepts upon the same grounds to the finding or conclusion of the Master that should the Order of October 29th, 1912, directing the exchange of transfers for single five cent fares with the New York Railways Company and the Second Avenue Railroad Company be put in force the expenses of operation would be $521,227.07 and the surplus of revenue over expenses of operation would be only $105,626.62.

17. It excepts to the failure of the Master to hold that the burden of proof is upon the complainant upon every issue in the case and especially to establish the confiscatory character of the Order of October 29th, 1912, and to establish that the decrease in expenses of operation since the injunction herein is due to the discontinuance of transfers and not to other causes.

18. It excepts upon the grounds heretofore stated to the finding or conclusion of the Master that the Commission failed to decide the rehearing before it within thirty days from the time when it was finally submitted.

[fol. 191] 19. It excepts to the failure of the Master to find that the result of the discontinuance of the transfers has not been to benefit the complainant, but has been to benefit the Third Avenue Railway Company by diverting transfer traffic to its lines from the lines of the New York Railways Company and the Second Avenue Railroad Company.

20. It excepts to the failure of the Master to find that the Order of October 29th, 1912, is not confiscatory at the present time, but is a reasonable service regulation.

21. It excepts, upon the grounds heretofore stated, to the finding or conclusion of the Master that the resumption of the transfers would increase the expenses of operation in round numbers $59,500 more than it would increase the passenger revenue.

22. It excepts to the failure of the Master to find that a resumption of the transfers would increase the passenger revenue as much as or more than it would increase the expenses of operation.

23. It excepts upon the grounds heretofore stated to the findings or conclusions of the Master that the amount of depreciation to be deducted in estimating the value of complainant's property was $128,246 and that the valuation of the entire property based on average prices during the first six months of 1921 was $2,859,754, and that after deducting depreciation the valuation would be $2,731,508.

[fol. 192] 24. It excepts to the use by the Master of any estimate of value based upon prices during the first six months of 1921.

25. It excepts upon the grounds heretofore stated, to the finding or conclusion of the Master that the witness Ryder was qualified to testify to the valuation of railway properties of the kind involved in this case.

26. It excepts to the acceptance by the Master of the testimony of the witness Ryder as to the cost of reproducing complainant's track structure upon the ground that it appeared from the testimony of said witness that the unit prices used by him in making his estimate were based upon hearsay and not upon personal knowledge or experience.

27. It excepts to the finding or conclusion of the Master that the valuation of complainant's property would not be affected by excluding therefrom the value of certain items of track and structure, as to which defendants objected that complainant had failed to prove title, the value of ducts in excess of the capacity required for complainant's operations, and the value of .31 of a mile of storage battery tracks not belonging to complainant.

28. It excepts to the failure of the Master to find that the conduct of the complainant as shown by the evidence, disentitles it to any equitable relief.

29. It excepts to the failure of the Master to separate the earnings and operating expenses and fares of the 59th Street line from the rest of the operations of the complainant.

30. It excepts to the failure of the Master to separate the valuation of the property used for 59th Street operation from the rest of the properties owned by the complainant.

[fol. 193] 31. It excepts to the failure of the Master to determine separately for 59th Street the profitableness of operation prior to the issuance of the injunction.

32. It excepts to the discrimination approved by the Master against passengers received by complainant on a combined ride from the Second Avenue Railroad Company and the New York Railways Company, in favor of passengers received from the Third Avenue Railway Company.

Dated, New York, June 13, 1923.

George P. Nicholson, Corporation Counsel, Attorney for Edward Swann, District Attorney of the County of New York, State of New York, Defendant. M. Maldwin Fertig, of Counsel.

[fol. 194] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

Alfred T. Davison, Solicitor for Plaintiff (Addison B. Scoville, of Counsel);

George P. Nicholson, Corporation Counsel, for Defendant Edward Swann (M. Maldwin Fertig, of Counsel);

Howard Thayer Kingsbury, Special Counsel to the Transit Commission (George H. Stover, Assistant Counsel).

KNOX, D. J.:

The Special Master has stated with accuracy and at length, the issues presented by the pleadings in this suit. He has also made an extended analysis of a considerable portion of the evidence adduced before him, and for such reason, I shall make no effort to summarize it.

In so far as the Master concluded the result of the preliminary injunction to be a reduction in plaintiff's cost of carrying passengers [fol. 195] to the extent of $105,900, I am unable to agree with him. To my mind the lessened outlay for operating expenses for the year ending June 30, 1922, when compared with like expenditures for the preceding year, is primarily to be attributed to reduced wages, lowered prices for materials and the abandonment of a portion of plaintiff's line of transportation. It is within the range of probability that some of the saving was due to the discontinuance of the transfers, inasmuch as the abandonment of the line took place some months prior to June 30, 1921, and reduced wages, together with lower prices, became effective, in part at least, within that period. A reasonably accurate apportionment of decreased expenditures as among these causes, and the discontinuance of transfers would be extremely difficult, if not impossible.

The evidence is, that after transfers were discontinued, there was no substantial decrease in car mileage upon the portion of the cross town line now in operation.

That the cars in service, prior to the issuance of the injunction, were "enormously overcrowded" is established by the letters of the Public Service Commission calling attention thereto. If the transfer passengers should again be carried, the service would be as bad as before, unless there should also be a substantial increase in plaintiff's car mileage. The character of service to be rendered by a public service utility is not, as such, a matter which concerns this Court. But even so, the facts, as the evidence shows them to be, cannot be overlooked, and reasonable inferences are to be drawn. One of such [fol. 196] facts is, that even now, with the injunction as to the five cent transfer order in effect, there should be an increase of ten per cent in plaintiff's car mileage. If five to six thousand more transfer passengers per day are to be added to the total number of persons

now being carried, it is plain as a pikestaff that plaintiff must necessarily increase its expenses by a very considerable amount.

From each additional transfer passenger, the plaintiff would derive a revenue of but two cents, and this sum, I am reasonably certain would not, and could not, after making all proper allowances indicated by the evidence, reimburse plaintiff for the out of pocket expense to which it would be put upon a restoration of the transfer privileges cut off by the injunction. It it be true, as indicated by some of the testimony, that operating expenses increase in proportion to an increase in car mileage, it is reasonable to suppose that a 12½% increase in the daily number of passengers now being carried, would necessitate, at least, the ten per cent increase in car mileage which the representative of the Transit Commission says should now be furnished. Upon the basis of operating expenses for the year ending June 30, 1922 (a non-transfer period), the increase in expense would be something like $46,000.

Without reference to a possible loss of revenue to plaintiff arising from the fact that numerous passengers who now pay five cents for a ride on the 59th Street Crosstown Line, would, if transfers are restored, pay into the treasury of complainant but two cents per ride, the probable revenue per year from passengers who would again utilize the line upon the restoration of transfers would hardly exceed, upon the basis of the Master's calculation, the sum of $42,000. Upon this theory the five cent joint rate, if restored, would be confiscatory.

[fol. 197] But even though I be mistaken upon this feature of the case, there remains another obstacle to the contentions put forth by defendants. It is this: If the passengers who would utilize plaintiff's line upon transfers from intersecting carriers, and as to whom plaintiff would receive only two cents each, were it not for the outstanding injunction, are to be considered as being properly chargeable with such proportion of plaintiff's costs in carrying them, and as is attributable to other passengers traveling over the line, there can be no doubt as to the propriety of granting the relief asked by plaintiff.

Defendants vigorously urge the inapplicability of any such theory in the determination of the question of the alleged confiscation of plaintiff's property, saying, that it is unsound in principle, and without support in ruling decisions. The Court, however, when convened under the provisions of Section 266 of the Judicial Code, and in passing upon plaintiff's application for a preliminary injunction, 273 Fed. 272, gave approval to the theory to which objection is made. Such holding should, I think, be considered as the law of the case.

The result to be reached is affected, of course, by the value to be accorded plaintiff's property for the purpose of calculating a reasonable return. The Master found the property to be worth, in round figures, the sum of $2,600,000. This finding, I believe, was justified by the evidence, and I shall not disturb it.

Adopting as I do the ruling of the statutory court, and accepting the Master's calculation upon the number of passengers to be carried,

the cost of transporting each of them, whether by transfer or not, [fol. 198] would be upwards of three cents. This cost, when added to fixed charges for borrowed money, would leave plaintiff without revenues sufficient to cover depreciation and a fair return on capital.

But aside from the particular theory to be employed in determining whether the Public Service Commission order of October 29, 1921, is confiscatory, the case presents the unusual and most persuasive circumstance that the Commission itself upon June 9, 1920 entered its order to the effect that the joint rate of five cents fixed by the order of October 29, 1912, had through changed conditions, become "unjust, unreasonable and insufficient to render a fair and reasonable return for the service furnished * * *." To my mind, this conclusion, notwithstanding the argument of defendants' counsel to the contrary, is the equivalent of a declaration by the predecessor of one of the defendants that the joint rate of five cents was confiscatory. The evidence satisfies me that the joint rate, if enforced, would continue to be confiscatory. The Master's conclusion to the same effect will be confirmed.

October 6, 1923.

Jno. C. Knox, U. S. D. J.

[fol. 199] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE AND ORDER ADOPTING REPORT OF SPECIAL MASTER—Filed Nov. 30, 1923

This cause came on to be heard further at this term and was argued by counsel, and thereupon, upon consideration thereof, and due deliberation having been had, it is

I. Ordered, adjudged, and decreed that the finding and conclusion of Honorable E. Henry Lacombe, duly appointed Master herein, in his report dated May 25th, 1923, and filed on that day in the office of the Clerk of this Court, that so much of the order of the Public Service Commission of the State of New York for the First District dated October 29th, 1912, as requires the plaintiff to exchange transfers for a single five cent fare with the lines of the Second Avenue Railroad Company and the New York Railways Company at First Avenue, Second Avenue, Lexington Avenue, Sixth Avenue and [fol. 200] Seventh Avenue is confiscatory, be and the same hereby is, confirmed; and it is further

II. Ordered, adjudged, and decreed that the order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, in so far as it fixes at five cents the maximum joint rate, fare or charge to be exacted for through transportation over the lines of plaintiff and the lines operated by all other street surface railway corporations or any of them named in said order (excepting the Third Avenue Railway Company and

The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company), and in so far as it requires plaintiff to maintain the through routes mentioned therein at the joint rates, fares and charges therein mentioned (excepting such through routes and joint rates, fares and charges as are between lines of plaintiff and lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company), and in so far as it requires plaintiff, at said joint rate, to deliver and receive transfers or other tokens entitling passengers to ride over the lines of plaintiff and the lines of any other street surface railway corporation named in said order (excepting the Third Avenue Railway Company and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company), is confiscatory and deprives the plaintiff of its property without due process of law, and is contrary to the Fourteenth Amendment to the Constitution of the United States; and it is further

III. Ordered, adjudged, and decreed that plaintiff has no remedy at law for the injury which will result from the enforcement of the said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, and such inquiry will be irreparable; and it is further

[fol. 201] IV. Ordered, adjudged, and decreed that the defendants, Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney of the County of New York, State of New York, and Transit Commission, State of New York, and each of them and their and each of their successors, and their and each of their officers, agents, servants and employees, and the officers, agents, servants and employees of the successors of the said defendants, and any other person acting under and by virtue of the authority of the said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, and the Public Service Commissions Law of the State of New York and any other law of the State of New York, in so far as any of said laws relate to or provide for the enforcement of said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, be, and each of them is, hereby severally perpetually restrained and enjoined from in any way enforcing or attempting to enforce the provisions of said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, against plaintiff, (excepting in so far as said order provides for joint rates, fares and charges between the lines of plaintiff and the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company), and from bringing any action thereon to enforce any penalties against plaintiff, and from bringing any action or proceeding in mandamus or for an injunction in any court whatsoever for the purpose of compelling compliance by plaintiff with the said order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912,

(excepting in so far as said order provides for joint rates, fares and charges between the lines of plaintiff and the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company), and from doing [fol. 202] any act or thing interfering with the right or authority of plaintiff to refrain from carrying out the provisions of the order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, (excepting in so far as such order provides for joint rates, fares and charges between lines of plaintiff and the lines of the Third Avenue Railway Company and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company); and it is further

V. Ordered, adjudged, and decreed that the compensation of E. Henry Lacombe, Master herein, is hereby fixed and allowed at the sum of Twenty-five hundred Dollars ($2,500), which shall be paid in the first instance by the plaintiff and shall be taxed as a part of the costs to be paid by the defendants to this plaintiff; and it is further

VI. Ordered, adjudged, and decreed that the plaintiff recover of the defendants the costs and disbursements to be taxed in this action, and that the plaintiff have execution therefor.

Jno. C. Knox, U. S. D. J.

[fol. 203] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUBSTITUTING JOAB H. BANTON AS DISTRICT ATTORNEY IN PLACE AND STEAD OF EDWARD SWANN

On the annexed consent of the solicitors for all parties, it is

Ordered that Joab H. Banton, as District Attorney, County of New York, be and he hereby is substituted as party defendant in the place and stead of Edward Swann, as District Attorney, County of New York, and that this suit be continued against the said Joab H. Banton, as District Attorney, County of New York, as such party defendant herein without prejudice to the proceedings already had herein.

Henry W. Goddard, U. S. D. J.

We hereby consent to the entry of the foregoing order.

[fol. 204] Dated New York, February 19, 1924.

Alfred T. Davison, Solicitor for Complainant. Howard Thayer Kingsbury, Solicitor for Defendant Transit Commission, State of New York. Carl Sherman, Solicitor for Defendant Charles D. Newton, as Attorney General. George P. Nicholson, Corporation Counsel, Solicitor for Defendant Edward Swann, as District Attorney.

[fol. 205] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

And now on this, the 27th day of February, A. D., 1924, come the defendant Transit Commission State of New York, by its Solicitor, Howard Thayer Kingsbury, Esq., and the defendant Joab H. Banton, as District Attorney of the County of New York, by George P. Nicholson, Corporation Counsel, and say and each of them says that the Decree entered in the above-entitled cause on the 30th day of November, A. D., 1923, is erroneous and unjust to said defendants in the following particulars:

1. In that the Court held and adjudged that the Order of the [fol. 206] Public Service Commission of the State of New York for the First District, dated October 29th, 1912, in so far as it fixes at five cents the maximum joint rate of fare or charge to be exacted for through transportation over the lines of plaintiff and the lines operated by all other street surface railway corporations, or any of them, named in said Order (excepting the Third Avenue Railway Company and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company), and in so far as it requires plaintiff to maintain the through routes mentioned therein at the joint rates, fares and charges therein mentioned (excepting such through routes and joint rates, fares and charges as are between lines of plaintiff and lines of the Third Avenue Railway Company, and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company), and in so far as it requires plaintiff at said joint rate to deliver and receive transfers or other tokens entitling passengers to ride over the lines of plaintiff and the lines of any other street surface railway corporation named in said Order (excepting the Third Avenue Railway Company and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company), is confiscatory and deprives plaintiff [fol. 207] of its property without due process of law and is contrary to the Fourteenth Amendment of the Constitution of the United States.

2. In that the Court confirmed the finding and conclusion of Hon. E. Henry Lacombe, the Master herein, in his report dated May 25th, 1923, and filed on that day in the office of the Clerk of this Court, that so much of the Order of the Public Service Commission of the State of New York for the First District dated October 29th, 1912, as requires plaintiff to exchange transfers for a single five cent fare with the lines of the Second Avenue Railroad Company and the New York Railways Company at First Avenue, Second Avenue, Lexington Avenue, Sixth Avenue and Seventh Avenue is confiscatory.

3. In that the Court held and adjudged that the plaintiff has no remedy at law for the injury which it held will result from the enforcement of the said Order of the Public Service Commission of the

State of New York for the First District dated October 29th, 1912, and further held and adjudged that such injury will be irreparable.

4. In that the Court awarded an injunction against the enforce-[fol. 208] ment of said order of the Public Service Commission of the State of New York for the First District dated October 29th, 1912.

5. In that the Court by its final decree refused to dismiss plaintiff's bill of Complaint.

6. In that the Court awarded to the plaintiff costs and disbursements against the defendants.

7. In that the Court failed to sustain each and every of the Exceptions of the defendant Transit Commission, and of the defendant Edward Swann, as District Attorney of the County of New York (Joab H. Banton, successor), to the Report of the Hon. E. Henry Lacombe, the Master herein, dated May 25th, 1923.

8. In that the Court held that the restoration of the transfers against which the preliminary injunction was granted herein would necessarily increase plaintiff's car mileage and operating expenses.

9. In that the Court held that the additional revenue which would be derived from the restoration of the transfers, against the requirement of which the preliminary injunction herein was granted, would [fol. 209] not reimburse plaintiff for the additional expenses which would be occasioned by such restoration.

10. In that the Court held that the decision of the District Court herein, convened under the provisions of § 256 of the Judicial Code upon plaintiff's application for a preliminary injunction herein, should be considered as the law of the case and applied such decision to the determination thereof.

11. In that the Court held that the cost of carrying each transfer passenger should be determined by allocating thereto a proportionate part of the entire cost of operation of the line measured by the entire number of passengers carried.

12. In that the Court found that the value to be accorded to plaintiff's property for the purpose of calculating a reasonable return thereon in this case was the sum of $2,600,000 and that the Master's finding of such valuation was justified by the evidence.

13. In that the Court found that the cost of carrying each passenger, including transfer passengers, was upwards of three cents.

[fol. 210] 14. In that the Court held that the Order of the Public Service Commission of the State of New York for the First District, dated June 9th, 1920, to the effect that the joint rate of five cents fixed by the Order of October 29th, 1912, had through changed conditions become unjust, unreasonable and insufficient to render a fair and reasonable return for the service furnished, was the equivalent of a declaration by said Commission that said joint rate of five cents was confiscatory, and confirmed the conclusion of Hon. E. Henry

Lacombe as Master, to the same effect, and failed and refused to hold and adjudge that said conclusion of the Master was unsupported by evidence, contrary to the evidence and against the weight of the evidence.

15. In that the Court failed and refused to hold and adjudge that plaintiff voluntarily assumed the obligation to perform the service required by the order of October 29th, 1912, for the sum of two cents for each transfer passenger carried by it.

16. In that the Court failed and refused to hold and adjudge that [fol. 211] the Public Service Commission of the State of New York for the First District did not fail to decide the rehearing before it of plaintiff's application for a modification of the Order of October 29th, 1912, within thirty days from the time when it was finally submitted.

17. In that the Court failed and refused to hold and adjudge that the result of the discontinuance of the transfers, the requirement of which was enjoined by the preliminary injunction herein, was not to benefit the plaintiff, but was to benefit the Third Avenue Railroad Company by diverting transfer passengers to the lines of the Third Avenue Railway Company from the lines of the New York Railways Company and the Second Avenue Railroad Company.

18. In that the Court failed and refused to hold and adjudge that the Order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912, is a reasonable service regulation.

19. In that the Court failed and refused to hold and adjudge that [fol. 212] the conduct of the plaintiff as shown by the evidence disentitles it to any equitable relief.

20. In that the Court by its Order of July 24th, 1922, adjudged that the second separate defense, added by Amendment to the Answer of the defendant Public Service Commission, First District, (Transit Commission successor) was insufficient in law and overruled such defense.

21. In that the Court by its Order of July 24th, 1922, refused to dismiss the Bill of Complaint herein upon the grounds stated in the Notice of Motion of the defendant Transit Commission, dated June 24th, 1922, and each of them.

22. In that the Court failed and refused to hold that the plaintiff, having been incorporated subsequent to the order of the Public Service Commission of October 29th, 1912, is not entitled to complain thereof as an infringement of any constitutional right of plaintiff.

[fol. 213] 23. In that the Court failed and refused to hold that the plaintiff, having acquired its street railroad properties subsequent and subject to the order of the Public Service Commission of October 29th, 1912, is not entitled to complain thereof as an infringement of any constitutional right of plaintiff.

24. In that the Court failed and refused to hold that the rate making process had not been completed by the duly constituted authorities of the State and that the plaintiff's suit was therefore premature; and failed and refused to dismiss the Bill of Complaint for that reason.

25. In that the Court failed to separate the earnings and operating expenses and fares of the 59th Street Line from the rest of the operations of the plaintiff.

26. In that the Court failed to separate the valuation of the property used for 59th Street Line operation from the rest of the properties owned by the plaintiff.

[fol. 214] 27. In that the Court failed to determine separately for the 59th Street Line the profitableness of operation prior to the issuance of the injunction.

Dated, New York, February 27th 1924.

Howard Thayer Kingsbury, Solicitor for Defendant Transit Commission, State of New York. George P. Nicholson, Corporation Counsel, Solicitor for defendant Joab H. Banton, as District Attorney.

[fol. 215] IN UNITED STATES DISTRICT COURT

[Title omitted]

To the Honorable John C. Knox, District Judge of the United States for the Southern District of New York:

The defendants Transit Commission, State of New York, and Joab H. Banton, as District Attorney of New York County, feeling themselves aggrieved by the decree made and entered in this cause on the 30th day of November, 1923, do hereby appeal from the said decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors which is filed herewith, and say that this is a case that involves the construction and application of the Constitution of the United States and also a case in which an order of the late Public Service Commission of the State of New York for the First District, having the force of a law of the State of New York, is claimed by plaintiff to be in contravention of the [fol. 216] Constitution of the United States, and pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the said Supreme Court of the United States at Washington, D. C.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made.

Dated New York, February 27th, 1924.

Howard Thayer Kingsbury, Solicitor for Defendant Transit Commission, State of New York. Office & P. O. Address, 2 Rector Street, New York City. George P. Nicholson, Corporation Counsel, Solicitor for Defendant Joab H. Banton. Office & P. O. Address, Municipal Building, New York City.

[fol. 217] Appeal allowed and bond to cover costs of appeal is dispensed with.

Dated New York, February 27th, 1924.

Henry W. Goddard, U. S. D. J.

[fol. 218] Citation—In usual form; omitted in printing

[fol. 219] In United States District Court

Before Hon. E. Henry Lacombe, Special Master

Appearances of Counsel

New York, October 17th, 1922—10.30 a. m.

Appearances: Alfred T. Davison, Solicitor for Plaintiff; George O. Redington, Counsel to Transit Commission, by Howard Thayer Kingsbury, Special Counsel; George H. Stover, Assistant Counsel; John P. O'Brien, Corporation Counsel City of New York, by M. M. Fertig, and Harry Hertzoff, Solicitor for District Attorney Swann.

[fol. 220] In United States District Court

Statement re Exhibits

Mr. Davison: I offer in evidence the following documents:

Map of the railroad lines in Manhattan affected by the matters in this controversy. I have marked in blue pencil on this map certain lines which, by exhibits which I will introduce later, have been abandoned.

(Marked Plaintiff's Exhibit A for identification.)

Deed from Ishman Henderson, as Master Commissioner to Edward Cornell, dated December 19, 1912. That is the deed to this railroad property, from the Master on mortgage foreclosure. It is a link in the chain of title of the railroad company to the property in question. It covers the railroad of the old Central Park, North and East River Railroad Company.

(Marked Plaintiff's Exhibit B.)

Copy of decree of foreclosure and sale in the United States Circuit Court for the Southern District of New York, in the case entitled "Farmers Loan & Trust Company, Trustee, Complainant vs. Central Park, North and East River Railroad Company and others, Defendants," under which the deed, Exhibit B was given.

(Marked Plaintiff's Exhibit C.)

Deed from Edward Cornell and wife, to Belt Line Railway Corporation, being the same property conveyed by Exhibit B, dated January 21, 1913.

(Marked Plaintiff's Exhibit D.)

Certified copy of Resolution or Franchise from the Board of Aldermen of the City of New York, dated December 28, 1861, to the Central Park, North and East River Railroad Company.

(Marked Plaintiff's Exhibit E.)

[fol. 221] Copy of Certificate of Incorporation of Belt Line Railway Corporation.

(Marked Plaintiff's Exhibit F.)

Mr. Davison: Exhibit G will be a Certificate of Incorporation of the Central Park, North and East River Railroad Company.

The Master: Exhibit G is to be furnished later.

Mr. Davison: I offer in evidence certified copy of Declaration of Abandonment by Belt Line Railway Corporation of that portion of its route on the east side of the City of New York, between 14th Street and the Battery, showing indorsed thereon the approval of such declaration of abandonment by the Public Service Commission of the State of New York for the First District on April 17, 1919.

(Marked Plaintiff's Exhibit H.)

Mr. Kingsbury: Does that not cover more than what you mentioned, Mr. Davison?

Mr. Fertig: This declaration of abandonment, if your Honor please, would seem in the moment we have had a chance to examine it, to be not only a declaration of abandonment, but contains also a resolution adopted by the Board of Directors of the Belt Line Railway Corporation, alleging deficits and other matters as to which we are not prepared to have to go in. If it is merely intended to be a resolution, the result of which an abandonment was permitted, and

not proving the facts alleged in that resolution, we have no objection to it.

The Master: Of course, it does not prove the recitals of the resolution, that they found it unprofitable or anything like that. It is not any proof of that fact. Proof of the fact merely that that is what they said.

[fol. 222] Mr. Davison: I offer in evidence certified copy of Declaration of Abandonment by the Belt Line Railway Corporation of that part of its route on the west side of the City of New York between 42nd Street and the Battery, having indorsed thereon the approval of the Public Service Commission of the State of New York for the First District, dated March 22, 1921. That was after the injunction order.

(Marked Plaintiff's Exhibit I.)

Mr. Davison: I offer in evidence certified copy of Order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912.

(Marked Plaintiff's Exhibit J.)

Mr. Davison: I offer in evidence certified copy of Order of Public Service Commission of the State of New York for the First District, dated October 24th, 1919, the effect of which was to eliminate the Eighth and Ninth Avenue lines from participation in the joint rate.

Mr. Kingsbury: I object to that as irrelevant and immaterial to any issue in this case.

Mr. Fertig: We join in that objection.

The Master: The objection is overruled. Mark it Exhibit K.

Mr. Kingsbury: Exception.

Mr. Fertig: Exception.

(Marked Plaintiff's Exhibit K.)

Mr. Davison: I offer in evidence certified copy of Order of the Public Service Commission of the State of New York for the First [fol. 223] District, dated February 27, 1920, the effect of which was to eliminate the line on Madison Avenue of the New York and Harlem Railroad Company from the participation in the joint rate.

(Same objection: ruling; exception.)

(Marked Plaintiff's Exhibit L.)

Mr. Davison: I offer in evidence certified copy of Order of the Public Service Commission, dated March 19, 1913, which is an order consenting to the mortgage and authorizing the issue of stocks and bonds by the Belt Line Railway Corporation.

(Same objection: ruling; exception.)

(Marked Plaintiff's Exhibit M.)

Mr. Davison: I offer in evidence certified copy of Order of the Public Service Commission of the State of New York for the First

District dated July 22, 1913, authorizing the issue of $49,700.00 of the capital stock of the Belt Line Railway Corporation, and the acquisition thereof by the Third Avenue Railway Company.

(Same objection; ruling; exception.)
(Marked Plaintiff's Exhibit N.)

Mr. Davison: I offer in evidence certified copy of the Order of the Public Service Commission of the State of New York for the First District, dated November 7, 1913, authorizing the issue by Belt Line Railway Corporation of $253,000. of the capital stock, and the acquisition thereof by the Third Avenue Railway Company.

(Same objection; ruling; exception.)
(Marked Plaintiff's Exhibit O.)

[fol. 224] Mr. Davison: I offer in evidence certified copy of Order of the Public Service Commission of the State of New York for the First District, dated October 8, 1915, authorizing the issue by the Third Avenue Railway Company of $2,020,500. of its bonds showing that part of such bonds are to be issued for the purpose of acquiring securities of the Belt Line Railway Corporation.

Mr. Kingsbury: I would like to make more than merely formal objection to that. I do not see that the securities of a company not a party to this proceeding can have any bearing on the propriety of a transfer order.

Mr. Fertig: We join in that objection.

(Objection is overruled; exeption.)
(Marked Plaintiff's Exhibit P.)

Mr. Davison: I offer in evidence certified copy of Order of The Public Service Commission of the State of New York for the First District, dated June 18, 1920, suspending a tariff which was filed by the Belt Line Railway Corporation, the effect of which would have been to have done away with the five cent joint rate.

(Marked Plaintiff's Exhibit Q.)

Mr. Davison: I offer in evidence certified copy of Order of Public Service Commission of The State of New York for the First District, dated July 9, 1920, in which the Commission recites that it is of the opinion that the maximum joint rate of five cents fixed in the Order of October 29, 1912, by reason of the changed conditions, unjust, unreasonable and insufficient to render a fair and reasonable return for the service furnished, and fixes a joint rate at seven cents instead of five.

(Marked Plaintiff's Exhibit R.)

Mr. Davison: I offer in evidence a certified copy of an Order [fol. 225] of the Public Service Commission of the State of New York for the First District, dated November 4, 1920, in which it orders a rehearing of the Order, Exhibit R, and defers and post-

pones for an indefinite period the putting into effect of any rate fixed by the Order, Exhibit R in this proceeding.

(Marked Plaintiff's Exhibit S.)

Mr. Davison: If your Honor pleases in preparing the exhibits showing the financial results, I had prepared for the period ending April 30, 1922 for the trial of this action, in June, certain exhibits. I have not brought those exhibits down to date, because I did not know definitely the time when we would put them in, and therefore at the next hearing I shall bring them down to date. At the present time I shall introduce only the exhibits which are referred to in the complaint or prove the facts so far as the financial conditions are concerned. These were not exhibits which were before the Commission; they were before the Court when it gave the injunction. They were annexed to affidavits. I am now about to prove them.

[fol. 226] WALTER FARRINGTON, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Davison:

I am acting auditor of the Belt Line Railway Corporation; have been such since November 1, 1921. Prior to November 1, 1921, I was assistant auditor for two years; and prior to that time was chief clerk in the accounting department for one year. I am familiar with the accounts, books and records of the Belt Line Railway Corporation.

Beginning with the conductor who takes the fares collected from passengers, the moneys are turned in at the several receiving depots daily, together with the conductor's day card, giving the number of cash passengers together with the money collected. On that card is also the number of free passengers. That money is deposited in a bank. The day cards giving the summary of the transactions, are turned over to the accounting department. Daily summaries are made of those transactions, which are recorded on loose sheets and from there into books. The sheets are called "Register Sheets" and the books "Traffic Statistics". At the end of the month these daily transactions are brought together and to a monthly total, recorded in the same books; and from those figures reports are made up. From the reports the entries are put on the general books, which give the record of the passengers carried and the business done during the month.

The accounts of the Belt Line Railway Corporation are kept in conformity with the uniform system of accounts as laid out and prescribed by the old Public Service Commission of the First District, and now by the Transit Commission. It is the same uniform system that has been carried right through the two bodies. Under that system we keep a separate item of expenditure for maintenance of way and structures. The several charges to that account are mostly

recorded from the operating department, that is, having to do with the maintenance of way.

[fol. 227] Moneys for these operating expenses are paid out through payroll, through the distribution of materials and supplies, and by checks. All moneys whether for payrolls or supplies or for direct operating expenses are in the form of drafts or checks. The check goes to the order of the treasurer, and he draws the cash and pays the men.

Those checks or drafts or vouchers are put through my hands first. The bill is properly checked as to the extension; record is made; then it is attached to what we call our voucher, which is a combination of voucher and check. The proper distribution of the bill, that is, as to what account this money is to be charged, is made and noted in the register. The voucher then passes through my hands to the treasurer's department. I approve the voucher when it passes through my hands. Before I approve it, I see that it is properly allocated so far as just charges are concerned, and also that it is properly approved by the head of the department to which that charge is made. No moneys are paid out except through the check in the way I have just described, except small payments through petty cash, and they came back to me for reimbursement—the petty cash fund. The treasurer is reimbursed through checks. No money is paid out but by check, and which is approved and allocated.

As far as the materials and supplies are concerned that material is distributed from our general store room. At the end of the month, we receive a summary showing the distribution of the materials distributed and the amounts. The proper charges are made. Those summaries contain the amounts of money represented by those supplies distributed; and it states to what company they are distributed and to what line. We make our charges accordingly on the books which I have described. That also applies to maintenance and equipment and to the money paid for power supply and for the operation of cars. The operation of cars item is largely payroll to the men on the cars. The payments are only made in the form of [fol. 228] vouchers. The general miscellaneous equipment expenses are the same way. In the hiring of equipment by the Belt Line Railway Corporation there is no money at the time those charges are made—just a charge which is paid at some time, practically on the same basis, on an agreement previously made. That is, for instance, the hiring of a car from some other owner. The items that we pay are shown by these checks or vouchers that I have described. The taxes that we pay are shown by these checks or vouchers that I have described.

Q. 48. Will you state what the capital stock outstanding of the Belt Line Railway Corporation is?

(Objected to as incompetent, irrelevant, and immaterial; objection overruled; Exception.)

The outstanding stock of the Belt Line Railway Corporation is $734,000.00.

Q. 50. And what is the amount of the funded debt of the Belt Line Railway Corporation?

(Same objection to this entire line of testimony; Objection overruled; Exception.)

The funded debt consists of First Mortgage Five per Cent Bonds and notes payable. First Mortgage Bonds are out for $1,750,000.00 and they bear interest at five per cent per annum. The notes payable are $73,091.53. They are demand notes. That is as of today. The rate of interest is five per cent.

The Belt Line Railway Corporation commenced operation March 22, 1913. Since March 22, 1913 and down to and including the making of the order in this case of January, 1921, it has not demanded from any passenger more than a five cent fare. It has given transfers to the lines named in the order (Exhibit J) when five cents [fol. 229] was paid and such transfer asked for. That is as to all the lines named in the exhibit. Of the five cent fare, the Belt Line would receive two cents and the lines of the New York Railways and the Second Avenue and so on receive three cents. The Belt Line Railway Corporation received two cents of the five cents collected, and all the other lines running north and south and to which they gave or received transfers, received three cents.

Mr. Davison: I offer in evidence copy of letter, dated January 10, 1913, to Public Service Commission for the First District signed by the General Manager of the Railroad. This is annexed to Exhibit J.

(Marked Plaintiff's Exhibit T.)

Q. 68. Now, Mr. Farrington, I show you this statement (Exhibit F annexed to the complaint) entitled "Belt Line Railway Corporation, Income from Operations, Year Ended June 30th, 1918." Will you state from what books this statement was made up, and how you arrived at the figures therein given?

A. These figures are taken from the general books of the Belt Line Railway Corporation. That is, they are all set forth in the general ledger. The figures which appear in those books are the figures which we have transferred from the traffic statistics and other books which I have described this morning. This statement correctly sets forth the income from the operation of the Belt Line Railway Corporation for the year ended June 30th, 1918, as shown by those books, and also the operating expenses and taxes as herein given, as shown by those books.

Mr. Fertig: I assume, your Honor, that this is past history, past financial history of the railroad, and that it is more historical than anything else. The finding, of course, will be based upon the present costs and not upon the history of 1918.

[fol. 230] Mr. Davison: On the contrary this shows the actual conditions when transfers were being given and received. Since January, 1921, we have not given nor received any transfers. So this is more than history, Mr. Fertig; it is actual fact, which must have reference to the issues in this case.

(Objection that the proof of it is incompetent as too remote in time, and not within the issues; Objection overruled; Exception.)

(Marked Plaintiff's Exhibit U.)

By Mr. Fertig:

Under "operating expenses and taxes" etc., I have an item "Maintenance of Way and Structures, $73,028.79" and then, next column, .35 cents. That .35 cents intends to show the proportion of maintenance of way and structures per passenger—the cost of carrying all the passengers, our regular five cent fares as well as our transfer passengers. That is to say, it costs as much to carry a transfer passenger as a regular passenger. If we had no transfer traffic at all we would have a certain amount to cover maintenance of way and structures.

X Q. 79. Your power supply and so all the way down to taxes, there would be a certain amount of fixed steady obligation and expense that would have to be incurred to carry the regular five cent cash traffic; so that these computations in the right column, 2.75 per passenger, they do not intend and cannot intend to cover the cost of carrying the transfer traffic?

A. Certainly.

During the year ending June 30, 1918, we carried 20,000,734 passengers all told. We carried that number of five cent passengers, two cent passengers and free transfer passengers; and we spent so much money on maintenance of way and structures, $73,000 odd. Therefore, the twenty million divided into the seventy-three odd thousand [fol. 231] dollars gives us the .35 cents. That is purely a mathematical calculation, the result of which is obtained in the manner I described, dividing that column of figures under operating expenses, each one of them and the total number of passengers, 20,000,734.

X Q. 83. And not taking into account the fact that transfer traffic is of another character; you have treated them all alike in the total of 20,000,734?

A. Yes, sir; I did.

Mr. Fertig: I might say, your Honor, that we will contend that this is a traffic, separate and apart from the rest and that there is a large expenditure required to carry the regular five cent fare. In order to compute what the transfer traffic costs, it would be necessary to make another computation of another character. The cars would have to be there and the fixed expenses. They would not require more cars in direct proportion to the additional passengers carried. If you have a fixed schedule of cars they are not always filled. Sometimes your additional traffic will take up empty seats.

The Witness: The interest on First Mortgage Bonds, interest on Notes Payable and amortization of Bond Discount—those percentages that appear in the right column, or rather these cents per passenger—were computed by taking the respective amounts and the twenty million passengers, as I have testified.

By Mr. Davison:

Q. 85. You have found, Mr. Farrington that the more passengers carried, the more the expenses of operation are increased?

Mr. Stover: I object to that.

The Master: What is the objection to it?

Mr. Stover: He is not competent to testify to it.

Mr. Fertig: And it does not necessarily follow as a matter of fact and common knowledge in railroad operation.

Mr. Kingsbury: That cannot be true. A certain number of cars might be running barely full. Those same cars in the same degree [fol. 232] of operation might carry fifty per cent more passengers without any increase in actual expenses; so as a generality it is not a fact.

Mr. Davison: Coming from the Transit Commission, that is an amazing argument. They are constantly making checks, to see whether or not cars are overcrowded or not, and if they are overcrowded, they ask that more cars be put on. If they are not overcrowded, no additional cars are put on; and the Transit Commission's theory is that the number of cars run is covered by the number of passengers to be carried and waiting to be carried; so that it must follow that the more passengers carried the more cars must be run, the more wear and tear is on the track, the more power consumed, the more conductors' and Motormen's wages are.

Mr. Kingsbury: I think it is obvious that a great increase in traffic would probably mean some increase in expense, but I do not think it follows and I think this is one of the points your Honor will have to pass on in this case—I do not think the increase in expenses is in any way proportionate to the increase in traffic. I might say now what our ultimate position in this case will be. We contend, on behalf of the Commission, that the test to apply in order to determine whether a transfer joint rate is reasonable is this: Does the added expense of operation required by the transfer system cost the company more than the added revenue it derives from the transfer passengers, and that you cannot simply figure on the entire revenue and entire expense of operation of the whole combined traffic. That is going to be one of the basic questions in this case, and I am glad of this opportunity to indicate it to your Honor, because I think all of the testimony should be considered with that contention in view.

Mr. Davison: Certainly there is no way of labeling or tagging a transfer passenger as distinguished from another kind of passenger, and as we shall prove here, and it is certainly a fact, the more passengers we carry the more cars we must run and the more the expenses are.

[fol. 233] The Master: I think the question as framed is practically asking for an opinion or a conclusion. I will allow you to show as a matter of fact the comparison of one year with another, as you went along, the experience of the road,—the more passengers carried the more expenses you incurred that year. That is a fact and you may show that. They may argue that you should not have incurred the expense and you may argue that it was necessary on account of the

additional passengers you had to carry. If you have any tabulations here for five or six years, showing in one particular year the number of passengers carried increased three million over those carried before, and that the expense of operation and maintenance of the road during that year increased so much, that it is legitimate testimony. The conclusion it points to is, of course, matter of argument, but I think your question as it was framed, as to whether in his opinion, if you increased the number of passengers the more the expense would be is objectionable.

Mr. Davison: I will withdraw that.

By Mr. Davison:

I am an officer of the Third Avenue Railway Company, the 42nd Street—and the other companies comprising the Third Avenue system. I am auditor of practically all of these companies. I am acting in the same capacity with respect to the receipts, expenditures and accounts of those companies as I have testified that I am acting for the plaintiffs in this case.

Q. 91. Will you state generally what the total receipts from fares are from all the companies comprising the Third Avenue System?

Mr. Kingsbury: I think that is wholly outside of this inquiry.

Mr. Davison: I am going to show it is so in every case of railroad operation, that the more passengers they carry—not opinion at all, [fol. 234] but actual facts—the more the expenses are.

The Master: I will let you show not only with regard to this road but any other road with which the gentleman has had experience, that comparing one year with another, if the number of passengers carried increased the expenditures for maintenance and operation increased; if the number of passengers decreased, the expenses decreased. Now, he has qualified himself as to all the roads, unless they have had different systems. I do not know that he has looked it up yet. This is a new line of thought; he may have to go back and look it over. I do not think I would press that question now. I think I would reserve that until he appreciates fully how much I am willing to admit, and has familiarized himself by looking over the old records. He can probably find a record where passengers fell off in a year and that when the passengers fell off the expense shrunk.

Mr. Davison: I will defer that line of questioning.

By Mr. Davison:

This statement (Exhibit G annexed to the complaint) correctly sets forth the income from operations of the Belt Line Railway Corporation for the year ended June 30, 1919, and also the operating expenses. This is all taken from the same books.

(Same objection; ruling; exception.)
(Marked Plaintiff's Exhibit V.)

The statements for the moving papers were prepared under my supervision.

This statement (Exhibit H annexed to the complaint) correctly sets forth the income from operations and the operating expenses of the plaintiff for the year ended June 30, 1920 as shown by the books I have described.

(Same objection; ruling; exception.)
(Marked Plaintiff's Exhibit W.)

[fol. 235] This statement (Exhibit I annexed to the Complaint) correctly sets forth the income for operation and operating expenses, as shown by the books I have described, for the period of four months ending October 31, 1920.

(Same objection; ruling; exception.)
(Marked Plaintiff's Exhibit X.)

These have got the carrying out of the decimal cents. The decimal cents appearing in the columns were arrived at in the same way as I described in regard to Exhibit U.

This statement (Exhibit J annexed to the complaint) correctly sets forth the income and operating expenses of the Belt Line Railway Corporation, from the beginning of its operation, March 22, 1913, to October 31, 1921, by fiscal years, as appearing in reports which we made to the Public Service Commission of the First District, as shown by our books.

(Same objection; ruling; exception.)
(Marked Plaintiff's Exhibit Y.)

Ely M. T. Ryder, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Davison:

I hold the position of way engineer in the service of the Belt Line Railway Corporation. I have charge of the tracks and structures and maintenances of structures.

The 59th Street line of the Belt Line Railway Corporation runs from First Avenue, on the east end, across 59th Street and south on Tenth Avenue to 54th Street. It runs from First Avenue to Tenth Avenue, the operated route, and down Tenth Avenue to 54th [fol. 236] Street. That line is a double track line of the underground slot or conduit construction, where the power is taken from conductor rails below the surface of the street and carried on insulators supported from the track construction.

By the Master:

I do not know where our power comes from. It is from the New York Edison Company. It does all come directly from them. We do not operate any power house; we have a power house but the New York Edison Company operates it.

Cross-examination by Mr. Kingsbury:

I do not know exactly how the power is furnished. Some of it, I think, comes through the New York Railways system directly. The Third Avenue System does not generate any power. As to whether any power comes through the Third Avenue System, I don't know about it.

(Adjourned until November 3rd, 1922, at 10.30 a. m.)

[fol. 237] New York, November 3, 1922—10.30 o'clock a. m.

Present: The Master; Mr. Davison, for plaintiff; Mr. Kingsbury and Mr. Stover, for Transit Commission; Mr. Fertig, for District Attorney Swann.

Mr. Davison: I offer in evidence page 158 of the minutes of hearing in Case No. 1364 on November 10, 1920, before the Public Service Commission.

The Master: If it is not long, had you better not read it right into the record.

Mr. Davison: Th matter is this: Mr. Mullen, who was counsel for the Commission said "That is all." Mr. Klotz, who was attorney for the New York Railways Company said "That is all. Is the case closed?" Commissioner Donnelly said, "The case is closed."

I now produce Exhibit G which was introduced at the last hearing.

The Master: It will be noted that Exhibit G is now here.

Mr. Davison: I call attention to or suggest on the record Chapter 511 of the Laws of the State of New York, 18 0, which is the statute which gives the franchise to the Central Park, North & East River Railroad Company.

[fol. 238] William E. Thompson, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Davison:

I am the superintendent of transportation of the Belt Line Railway Corporation. I also hold that position in connection with the other companies affiliated with it in the Third Avenue railroad system. All of them together operate approximately about 375 miles of street surface tracks in the Boroughs of Manhattan and Bronx. I have held this position since January, 1919. Until that time, after 1914, I operated the Brooklyn North River Railroad which connected the Boroughs of Manhattan and Brooklyn across the Manhattan Bridge. Before going with the Brooklyn North River Railroad, I was superintendent of transportation of the Coney Island, Brooklyn Railroad in Brooklyn. Prior to going with the Coney Island & Brooklyn Railroad, I was chief Inspector and division inspector on a railroad in

Richmond, Virginia, from 1903 till 1908. Continuously from 1903 to the present time, I have been connected in the actual operation of street surface railways in a supervisory capacity. That has brought me into contact with every detail of the operation.

I am familiar with the operation of the 59th Street Crosstown line of the plaintiff. There can be no distinction between the facilities offered prior to the elimination of the transfers on 59th Street, January 31, 1921, to the passengers from whom the plaintiff received two cents as compared with those from which it received five cents, because they cannot be recognized. These facilities are exactly the same. Where a passenger prior to January 31, 1921, boarded a car and paid a five cent fare on the 59th Street line, there was no way of [fol. 239] distinguishing whether he was a passenger from whom the plaintiff received five cents or two cents. He might receive a transfer and not use it. If he boarded the car and paid a nickel, unless the transfer was turned in to the company by which it was issued, he would be a five cent passenger. When the passenger was on the car we had no way of distinguishing whether he would use the transfor when he paid the fare and took a transfer. A great many who asked for and received transfers never used them. It is not until the transfer is collected by foreign companies or actually presented to the plaintiff for honoring, in the way of paying three cents, that the plaintiff ever had any knowledge of who were or who were not what we call two cent passengers. Only after the transfers had been used and returned to the Belt Line Railway Corporation for redemption, do we know what percentage of the five cent fare had become two cent fares.

Q. 17. Is there any difference in cost per passenger in carrying these passengers who received and used transfers and those who did not use them?

Mr. Fertig: I object to that.

Mr. Kingsbury: I object to that as incompetent and calling for a conclusion.

The Master: Is it necessary to ask a question on a subject which is so entirely oblivious? Does it not cost as much to carry a man in a car whether he pays five cents or whether he does not pay anything, as long as they carry him in the car, from one point to another. I [fol. 239½] do not see any necessity for a question for such an obvious proposition.

I am familiar with the division of the five cent joint rate agreed upon between the plaintiff and the foreign companies. That division was two cents for the short or crosstown line, and three cents for the longitudinal line.

The short haul ride on the 59th Street line would necessarily be less than two miles and the longitudinal lines running north and south might be five or six miles.

I have made observations on the 59th Street line. The average ride is less than a mile.

Mr. Fertig: Just a moment.

[fol. 240] The Master: Let us find out what the observations were. How do you get at what is the average?

The Witness: By observing the heaviest loading point on the line, and the points at which the greatest amount of people board and leave the car.

Mr. Fertig: May I ask the witness with reference to those qualifications?

The Master: Yes.

By Mr. Fertig:

The way I have described is the best way of ascertaining the average ride of a passenger on the 59th Street line. If you are undertaking to arrive exactly at the distance it would be necessary to know the distance covered by each passenger. But for all operating information, the point at which the greatest number of passengers board and leave the car, the distance between those points gives you the necessary operating information. I did not state that less than a mile was the exact distance as might be figured out mathematically by having the exact distance of the ride of each passenger. It is a conclusion drawn from my observation as to the points at which there is most boarding and leaving a car. When I say average, I do not mean mathematical average.

By Mr. Davison:

In my opinion the average length of ride is less than a mile.

I have made observations to determine the average length of haul of the joint rate passengers prior to January 16, 1921, on the Third [fol. 241] Avenue line of the Third Avenue Railroad Company and on the Tenth Avenue line of the 42nd Street Company. Both of these are parts of the Third Avenue system. And also on the Broadway line operated by the Third Avenue system. Those observations were made in the same way as I have mentioned with reference to the 59th Street Crosstown line—observing the loading and discharge of passengers and the maximum load on the cars at the various points. We have a field force whose duties are to observe the loading conditions and the number of cars at given points. They make what they call "checks"—make them periodically. Those checks are given to me from time to time; and are also from day to day put together and averaged, so as to get the average condition at the points where the observations have been made.

Q. 45. What, in your opinion, is the average length of haul of a passenger on the Third Avenue line of the Third Avenue Railroad Company?

Mr. Kingsbury: I object to that as immaterial unless it is limited to transfer passengers.

Mr. Davison: Joint rate passengers; I will limit it to joint rate passengers.

A. I will have to say I do not know, because we cannot distinguish whether they are joint rate passengers.

The Master: I will take the testimony for what it is worth as to similar observations on any line of the Third Avenue system which is given with regard to the 59th Street.

[fol. 242] By Mr. Davison:

In my opinion the average length of haul of a rider on the Third Avenue line of the Third Avenue Company is about two miles.

The average ride on the Broadway line is a little longer than on the Third Avenue line. I should say it averaged about 2½ miles.

On the Tenth Avenue line of the same company it is about two miles, perhaps a little less.

Our notice to the public when the Belt Line Railway Corporation ceased to give and receive transfers under this joint rate read that they ceased at midnight between the last day in January and the first day in February, 1921. The exact time when the company ceased to give transfers was January 31, 1921 midnight.

Prior to January 31, 1921, the condition of street railway travel on 59th Street, so far as the service furnished was concerned, was badly overloaded. In my opinion it had reached the point where more cars were necessary to furnish adequate service for the travel that was offering.

Mr. Fertig: I would like to ask that the answer to the last question be stricken out on the ground that the question is too general and the answer does not give specific information and it can only be a conclusion. The witness said the traffic had reached such a point where it was so overloaded that it needed additional cars.

The Master: That is qualfied by the opinion of the witness;

Mr. Fertig: All that is based on specific data which ought to be in [fol. 243] the record, if any conclusion is to be passed on it. Those are matters as to which there must be undoubtedly statistical data, so we can analyze it; but we cannot analyze a statement of that sort.

The Master: You have the opportunity on cross-examination to find out on which basis his opinion is given, on what he bases his opinion. The objection is overruled.

Mr. Fertig: I except.

Mr. Davison: I offer in evidence letter from the Public Service Commission to Edward A. Maher, Jr., Vice-President of the Third Avenue Railway system, it being understood that the Belt Line Railway Corporation is part of that system. The letter is dated November 13, 1919.

(Marked Exhibit X A.)

Mr. Davison: I offer in evidence letter from the Public Service Commission to Mr. S. W. Huff, President of the Third Avenue Railway Company, dated January 8, 1920, in which the service on the 59th Street line is specifically referred to; and also the checks of the travel on the 59th Street Crosstown Line made by the Public Service Commission on January 6, 1920 and annexed thereto.

(Marked Exhibits Y A and Y 2.)

Mr. Davison: I offer in evidence letter from the Public Service Commission to S. W. Huff, President, Third Avenue Railway Company, dated April 5, 1920, together with a check showing conditions of travel on the 59th Street Crosstown line, made March 31, 1920, which was annexed to said letter.

(Marked Exhibits Z and Z2.)

[fol. 244] Mr. Fertig: I should like to note my objection to this line of testimony on the ground that it is immaterial and is not within the issues of this case.

Objection overruled.
Exception.

Mr. Davison: I also offer in evidence a letter from the Public Service Commission to S. W. Huff, President, Third Avenue Railroad Company, dated November 12, 1920, together with three checks made respectively October 28, October 29 and October 29, 1920, which are annexed. One is East and one is West on October 29.

(Marked Exhibits B A, B A-2, 3 and 4.)

Mr. Davison: I offer in evidence letter from the Public Service Commission to Mr. S. W. Huff, President, Third Avenue Railroad Company, dated November 16, 1920, together with two checks annexed thereto, made each on November 13, 1920.

(Marked Exhibits B B, B B-2 and B B-3.)

The Witness: The necessity for operating more cars on the 59th Street line prior to January 31, 1921, applied to the non-rush hours as well as rush hours. These cars were overloaded in the non-rush hours and demands for additional service were made by the Transit Commission both in the rush and non-rush hours, and on Saturday and on Sunday, as well as on week days. The request from the Public Service Commission for increasing the number of cars applied to the non-rush hours as well as the rush hours.

Q. 56. Were these increases in number of cars operated, which you referred to, as I understand, an increase in service or not? A. Yes, sir.

[fol. 245] Those increases in service would have been material increases. It necessitated very material increase to have given the service that the Commission was demanding and the service we are giving now—that is, an increase in the number of cars operated and decrease in the headway between them. That would have increased the expense of operation.

Q. 63. If those increases which you say should have been made had been made prior to January 31, 1921, will you state what would have been the effect on the street railway travel and the service?

Mr. Kingsbury: I object to that as purely speculative.
Mr. Fertig: I make the same objection; as being hypothetical.

The Master: Suppose you limit it to 59th Street.

Mr. Davison: Yes, I limit it only to the 59th Street line.

The Master: I do not know why we cannot take his judgment as to the number of cars on a line of that length. I will overrule the objection and give you an exception.

A. The traffic of 59th Street was congested. It had not reached the point of saturation. I mean by that, where it was impossible to operate more cars through the street, but it had reached the point where adding additional cars, putting on additional cars, would have meant further congestion with the consequent slowing down of all movement, and the slowing down of the traffic movement would have increased the cost not only as affected directly by the added cars, but also in the movement of the cars already in operation. The [fol. 246] slowing down of the service would have put a general increase on the entire operation, by slowing the entire operation down. That means that the longer it takes a motorman to go along the line, the more wages you would have to pay him, to do the same work. The slowing down of the service would have made it less attractive to the riding public, and that is especially true on a cross-town line, where they ride or walk. This would have been reflected more on 59th Street than the slowing down of a longitudinal line where the average ride is longer. It is my experience that, if proper service is given, the more passengers there are carried, the more the operating expenses are. By increasing the service you increase the expense.

The line on First Avenue between 14th Street and 59th Street, north of 14th Street, is operated now by the Dry Dock, East Broadway and Battery, but it covers the route of the Belt Line Railway Corporation. As to how long that has been going on, I cannot give you the exact date. It was prior to 1919, when I came with the company. I have made checks on the operations by the Dry Dock Company on First Avenue above and below 14th Street, to determine the relative riding and use of the line above and below.

Mr. Fertig: I want to note an objection to the materiality and relevancy.

Cross-examination by Mr. Kingsbury:

Prior to January 31, 1921, the 59th Street line transferred at 59th Street and First Avenue to Avenue B line of the Dry Dock, East Broadway and Battery, and to the Second Avenue Company. The Second Avenue line was on First Avenue north of 59th Street. [fol. 247] The Avenue B, the Dry Dock, was First Avenue north of 59th Street. The Second Avenue line went along 59th Street from Second to First Avenues, and north on First Avenue, making First Avenue and 59th Street a northbound transfer at 59th Street and Second Avenue to the Second Avenue Company, north and south.

59th Street and Third Avenue, north and south on the Third and Amsterdam Avenue cars of the Third Avenue Company.

59th Street and Lexington Avenue, north or south on Lexington

Avenue of the New York Railway Company cars. It is referred to in our tariff as the New York Company.

59th Street and Sixth Avenue, south on the Sixth Avenue line of the New York Railways Company.

At 59th Street and Seventh Avenue, south on Seventh Avenue lines of the New York Railways Company.

At 59th Street and Broadway, north or south on the Broadway line of the 42nd Street Manhattanville & St. Nicholas Avenue Railway Company.

59th Street and 10th Avenue north or south on the Tenth Avenue line of the 42nd Street Manhattanville & St. Nicholas Avenue Railway Company.

I do not know under what order these transfers were issued.

Transfers to the Eighth and Ninth Avenues, as well as the Madison Avenue, had been discontinued.

Under the injunction in this case and after January 31, 1921, we discontinued all transfers except those to lines operated in the Third Avenue Railway system.

I will give the ones that were left and continued: To the Third [fol. 248] and Amsterdam line of the Third Avenue Company and to the Broadway line of the 42nd Street M. & S. and to the Tenth Avenue line of the 42nd Street M. & S. Those still exchange transfers.

After January 31, 1921, we continued to make observations and checks even up to date on all lines. It showed that travel on 59th Street had decreased. I could not say how much, offhand. I can't say. If this will answer your question: That it had decreased to the point that the service being offered on the 59th Street was adequate to take care of the traffic offering without putting on additional cars. I mean service prior to January 31, 1921.

X Q. 91. Are you and have you continuously since January 31, 1921, been giving the same service as you gave before January 31, 1921?

A. The service since that time has been improved by continuing to operate the same number of cars with the decreased travel offered.

The Master: The question was, did you continue to operate the same number of cars.

A. Approximately the same. There has been a very slight decrease in mileage, but it is approximately the same service.

I did not say that we operated the same number of cars but have not run them quite so far. I meant without taking any total, or whether a car did not operate at all or whether several cars were short lined to make up a given amount of mileage; but the mileage operated on 59th Street is approximately the same. There has been a very slight decrease in car mileage.

[fol. 249] There was considerable decrease in the number of passengers carried immediately following the discontinuance of transfers. There has been a gradual increase all over the whole system—all over the City.

We did not find it necessary to increase the car mileage operated on that line nor has the Commission found it necessary to ask for it.

By Mr. Kingsbury:

X Q. 97. As an operating man familiar with such matters, is it your opinion that the carrying of each additional passenger imposes a proportional increase in expense upon the company?

A. I think you would have to consider what lines you were discussing before that question can be answered intelligently.

X Q. 98. Well, let us get at it then a little differently. If a line is not operating to full capacity, the addition of further passengers would not increase the expenses of operation, would it?

A. May I put it in my words, to see whether or not I understand and can answer the question?

X Q. 99. Put it in any way you like, and I will ask further questions if I think it necessary.

A. I think what you mean, Colonel, is that a line on which the travel offering is not the controlling factor in the service to be furnished—and I mean by that to say that you run a given number of cars whether they are filled or empty—then additional passengers might not increase the cost, but where the travel offering is sufficient [fol. 250] to become the governing factor in the service that you render, then carrying additional passengers must of necessity increase the cost because of additional facilities.

X Q. 100. It does not increase your item of the cost, however, does it?

A. No.

X Q. 101. It does not increase your taxes?

A. No.

X Q. 102. It does not increase your overhead expenses for administration?

A. Now, as to the items of increase in that I am going to ask you to question the auditor, because I am not familiar with the various accounts.

X Q. 103. Have you with you any detailed figures showing the results of operation in number of passengers carried shortly before and shortly after the discontinuance of transfers on January 31, 1921?

Mr. Davison: I have exhibits to put in through the auditor showing just those items.

X Q. 104. Then that phase of the matter does not come within your special province?

A. Not the exact number, no.

X Q. 105. You simply observed general conditions?

A. Yes.

Shortly prior to January 31, 1921, we tried increasing the service. At the insistent demand of the Commission we put on, as I recall it now, five additional cars. I am not positive as to the exact number—and met with the result that I have just described: and when I described that result it was not a theory, but observation of real operation, that it slowed down the traffic.

X Q. 198. So that you carried fewer passengers by the slowing down?

[fol. 251] A. It had not been in operation long enough; the additional cars had not been in operation long enough after the discontinuance of the transfer to itself have any material loss of passengers because of the slowing down. That, as I recall it, was either in the latter part of December or in the early part of January, when we attempted operating these cars. It was done as a trial. The Company agreed with the Commission that in view of the continual demand for extra service and our figures showed that the line was under-served, that we would put on extra cars and try them out, and then undertake to work out a schedule so as to make it permanent if it was possible.

X Q. 109. Then you took those five cars off after the discontinuance of the transfer?

A. No, they were not taken off for the entire day; they were taken off for portions of the day.

X Q. 110. Have you any observations which would show how the discontinuance of transfers prior to January 31, 1921, was reflected in the number of passengers carried?

A. I think that will be shown in the report made by the auditor.

X Q. 11. You did not make any observation on that subject?

A. We did not make any tabulations. We made observations but not tabulations.

The general result of our observations was that at the points where transfers were exchanged, loading and unloading had materially dropped off.

I do not know about what proportion of our whole number of passengers carried now consist of transfer passengers to or from the [fol. 252] other lines of the Third Avenue system; I cannot answer that. Such figures are available. I presume they have them.

Mr. Davison: The exhibits I will offer, Colonel Kingsbury, will show that.

By Mr. Fertig:

X Q. 116. As an operating man, can you tell us what the difference in maintenance of way and structures would be as between traffic handled before the discontinuance of the transfer and after?

A. As an operating man I have not anything to do with that particular part of it. That is the auditor's part of the job.

X Q. 117. Do I understand you to say that as an operating man of many years' experience, you could not undertake to say what the difference was or ought to be even approximately.

A. No.

X Q. 118. And I assume your answer would be the same if I inquired as to other operating charges, such as maintenance of equipment?

A. Yes.

X Q. 119. And power supply?

A. Yes.

X Q. 120. If you operated the same number of car miles, I think you will concede that if the price paid motormen and conductors was the same, that at least that item would be the same.

A. That was not the question you asked me. That is perfectly true. But you asked me how much, and I do not know how much.

X Q. 121. Well, would the maintenance of way and structures be any less?

A. If there were less cars operated, I should say they would.

X Q. 122. If you have the same car mileage?

A. Then I should say it would not be a great deal less with the same car mileage.

[fol. 253] X Q. 123. Well, practically speaking, it ought not to be any less.

A. I think that is obvious.

So far as maintenance of equipment is concerned, with the same amount of car mileage we would have substantially the same expense, provided of course, that the cost in these things did not fluctuate.

As to power supply I should not think there would be any difference. The load of the car would make some difference.

I should think our general miscellaneous expenses ought to be the same. I am an operating man and not an auditor. If you want to get these figures, I would suggest that you ask them from somebody that knows something about it, rather than conclusions I admit I am not capable of giving.

X Q. 131. I am not asking you what your figures were. I am asking you as an operating man what the difference ought to be as between one state of facts and another?

A. If they ought to be I would try to know what they are. I do not know that they ought to be.

Redirect examination by Mr. Davison:

When I speak of the "Commission" in my testimony I mean the Public Service Commission. It was the Public Service Commission at that time; now the Transit Commission.

The majority of the observations that I said I had made were checks made by the field force I have spoken of. Some of them were personal observations.

All of the line inspectors report overload or other service condi- [fol. 254] tions at the points that they observe them. They are posted at convenient places so as to get the best view of the car as it passes, with the hope of making it as accurate as possible, not to have them count every passenger. They are furnished with the seating capacity of each type of car and they count the standees and add to that the seating capacity to get the load on the car. If there are vacant seats, it is, of course, subtracted.

In my statement to Colonel Kingsbury of transfers which are still continued, I do not think I included the transfers given to the First Avenue line, south of 59th Street. I started with the Third Avenue. We transferred south to the Avenue B line of the Dry Dock Company. That line, north of 14th Street, is a portion of the same

franchise as the plaintiff. The transfers we give at 59th Street and First Avenue going south are to continue a ride on the plaintiff's line, and not necessarily a transfer to another company, as the other transfers are.

[fol. 255] CHARLES E. HALL, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Davison:

I am a civil engineer and surveyor, and assistant engineer, maintenance of way, for the plaintiff.

Measurements of the width of the roadway from curb to curb on 59th Street were made under my direction.

At the present time from First Avenue to Second Avenue the measurement from curb to curb is 30 feet; from Second Avenue to Fifth Avenue, it is 34 feet; from Fifth Avenue to Columbus Circle it is 60 feet; from Columbus Circle to Ninth Avenue it is 34 feet; and from Ninth Avenue to Tenth Avenue, 30 feet. Where it is 34 feet, is where it was recently changed—subsequent to January 31, 1921.

Between Columbus Circle and Fifth Avenue the width between the outer rail of each track—the entire width of the tracks including space in between the outside rails—is 14 feet and 9 inches and elsewhere it is 13 feet and 9 inches.

Where 59th Street adjoins Central Park the width between the northerly curb and the first rail of the westbound track is not the same as the width between the southerly curb and the first rail of the easterly bound track. The distance from the northerly rail of the westbound track to the northerly curb is 19 feet 2 inches; the distance from the southerly rail of the eastbound track to the southerly curb is 26 feet 1 inch.

On the balance of the line, where the roadway is 30 feet from curb to curb, the distance from rail to curb is 8 feet 1½ inches; where the roadway is 34 feet, the distance is 10 feet 1½ inches on either side.

These are all actual field measurements.

[fol. 256] WALTER FARRINGTON, recalled as a witness on behalf of the plaintiff, having been previously sworn, further testifies as follows:

Direct examination by Mr. Davison:

I have prepared a statement of the income from operations of the plaintiff on its lines for the period February 1, 1921, to September, 1922, that is from the cessation of the transfer down to date. This statement correctly sets that forth.

Mr. Davison: I offer it in evidence.

Mr. Kingsbury: We note the same objection as before, to the attempted apportionment of operating expenses.
Mr. Fertig: We join in the same objection.

Overruled.
Exception.
(Marked Plaintiffs' Exhibit BC.)

This statement correctly sets forth the income from operations of the plaintiff for the period February 1, 1919 to September 30, 1920, which is the corresponding period to the period shown in Exhibit BC.

Mr. Davison: I offer that in evidence.

(Same objection, ruling and exception.)
(Marked Plaintiffs' Exhibit BD.)

This statement correctly sets forth the income from operations of the plaintiff for the year ended June 30, 1921.

Mr. Davison: I offer that in evidence.

(Same objection, ruling and exception.)
(Marked Plaintiffs' Exhibit BE.)

This statement correctly sets forth the income from operations of the plaintiff and its expenses for the year ended June 30, 1922. [fol. 257] Mr. Davison: I offer that in evidence.

(Same objection, ruling and exception.)
(Marked Plaintiffs' Exhibit BF.)

This statement correctly sets forth the income and expenses of the plaintiff for the period from July 1, 1922 to September 30, 1922.

Mr. Davison: I offer that in evidence.

(Same objection, ruling and exception.)
(Marked Plaintiffs' Exhibit BG.)

Q. 107. And does this statement, which I show you, correctly set forth separately and for each year the revenues and expenses of the plaintiff for the year ended respectively June 30, 1921, and 1922, and the three months ended September 30, 1922, this being practically a resume of the three previous exhibits (handing to witness)?
A. To the extent this is actual book figures, as here we have included interest earnings and also the depreciation where it was set up. Otherwise it is the same.

Mr. Davison: I offer that in evidence.

(Same objection, ruling and exception.)
(Marked Plaintiffs' Exhibit BH.)

I am the acting auditor of the Dry Dock, East Broadway and Battery Railroad Company. The books of that company are kept in the

same manner as I have described for the Belt Line Railway Corporation. Our methods of receipts and expenses and the method of recording them, and the number of books we keep, and so forth, are practically the same.

Q. 111. Does this statement, which I show you, correctly set forth the receipts and expenses of the Avenue B line of the Dry Dock, East Broadway and Battery Railroad Company, arrived at on a car mile basis——

Mr. Fertig: I want to object to that as wholly irrelevant and immaterial, and outside the issues.

[fol. 258] Mr. Kingsbury: I join in the objection.

The Master: Overruled.

Q. 11 (continued).—for the years ended June 30, 1921 and 1922 and the three months ended September 30, 1922 (handing to witness?)

A. It does.

Mr. Davison: I offer it in evidence.

(Same objection, ruling and exception.)
(Marked Plaintiffs' Exhibit BI.)

The Master: I will let the ruling stand, and give you an exception.

Prior to January 31, 1921, the five cent joint rate was divided between the plaintiff and the companies with which it was participating as between two and three cents. The Belt Line was credited with the two cents.

Every day the transfers issued by other lines were picked up on the 59th Street line and counted. Likewise, the transfers issued by the Belt Line were picked up and counted; and at the end of the month those transfers were exchanged and a check made on the other company's count and statements exchanged as to the number of transfers so picked up and so honored, and the amount either credited or charged, and the money actually paid. For all the transfers issued by other companies which the plaintiff picked up it was credited with two cents; and for all the transfers which were picked up by the other lines, issued by the plaintiff, the other lines were credited with three cents, and a balance was taken and adjustments made.

[fol. 259] Charles E. Hall, recalled as a witness on behalf of the plaintiff, having been previously sworn, further testified as follows:

Direct examination by Mr. Davison:

I am able to state the route of the Avenue B line of the Dry Dock, East Broadway and Battery Railroad Company from its northerly terminus at 59th Street and First Avenue, southerly: From 59th

Street and First Avenue on First Avenue to 14th Street; easterly at 14th Street to Avenue B; Southerly on Avenue B to Second Street; westerly on Second Street to Avenue A; southerly on Avenue A to Delancey Street; southerly, continuation of Avenue A, down Essex Street to Canal Street; then crossing the intersection there at Canal and Rutgers and East Broadway to East Broadway; southwesterly on East Broadway to Chatham Square; and southerly on Park Row to the Post Office, City Hall Park. Returning from the Post Office to Chatham Square, northerly on Park Row and East Broadway to Clinton Street; northerly on Clinton Street to Avenue B, Second Street; and then returning by the same route to 59th Street and First Avenue.

[fol. 260] ELY M. T. RYDER, recalled as a witness on behalf of the plaintiff, being previously sworn, further testifies as follows:

Direct examination by Mr. Davison:

From 59th Street to 42nd Street, the track on First Avenue is the old horse-car track—double track—consisting of nine inch rails on cross ties, paved with granite. On First Avenue from 42nd Street to 34th Street is the underground electric slot construction, the same as I described for 59th Street. On First Avenue from 34th Street to 14th Street, it is the same type of horse car track as I described for above 42nd Street.

Cross-examination by Mr. Kingsbury:

Storage battery cars are operated over that part of the tracks which is simply the old fashioned horse car track. The Avenue B line is operated by storage battery cars. The parts where it has the underground wire, it does not use it.

(Adjourned until November 21, 1922, at 10.30 o'clock a. m.)

[fol. 261] New York, November 21, 1922—10.30 a. m.

Present: The Master; Mr. Davison and Mr. Scoville, for plaintiff; Mr. Kingsbury and Mr. Stover, for Transit Commission; Mr. Horowitz, for District Attorney Swann.

[fol. 262] JOHN H. MADDEN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Davison:

I am a civil engineer. I was retained by the Transit Commission in May, 1921, as valuation engineer to make a valuation of all street railway and rapid transit railroads in Greater New York. I am still

retained. Prior to that time, I had been engaged in the general practice of engineering, which included the construction and estimating on and building of railway properties similar to those to be valued under the Transit Commission's plan. I had also been retained by Judge Hughes as engineer in the investigation conducted by the Merchants Association of the street railway systems in the City of New York.

In connection with my retainer by the Transit Commission, we organized a force and made an inventory of all property that was in the possession of the railroad companies, either classed as useful for operation or as nonoperative property; conducted an examination of all available data to determine costs at the time that the properties were originally constructed, and also conducted an examination to determine costs at other periods, one of which was the first six months up to June, 1921. When I said "We organized a force," I meant the Bureau of Valuations of which I was the head.

Q. 10. Did you in the course of that work determine and make an estimate of the cost to reproduce the property of the Belt Line Railway Corporation as of June 30, 1921?

[fol. 263] Mr. Kingsbury: I object to that as irrelevant and immaterial to any issue in this case.

Mr. Horowitz: I join with him in my objection.

(Objection overruled; exception.)

A. One of the valuations that we made was of the property in existence, June 30, 1921, yes sir.

Q. 11. Did you make an estimate of the cost to reproduce new the property of the Belt Line Railway Corporation in existence on June 30, 1921, as of June 30, 1921?

Mr. Horowitz: I object on the ground that the witness has not qualified and no proper foundation has been laid, and there is no evidence here of his ability to make a proper estimate.

The Master: Objection overruled. On cross examination you can go below the surface indications which are given here.

Mr. Horowitz: Exception.

A. The inventory was made as of June 30, 1921. The estimate to reproduce was made at the average prices for the first six months of 1921.

The Master: Now why do you not bring out from him what that inventory showed was the property because that is what he estimated. He may have omitted something, or he may by mistake have gotten some property in that did not belong to it.

Q. 13. What did the inventory of the property as of June 30, 1921 include?

Mr. Kingsbury: I object to that your Honor on the ground that it has not yet been established just what was the property of the Belt Line Railway Company at that or at any other time. There have

[fol. 264] been general descriptions of it. I have no objection to his asking what property he did include in the inventory, but I did not wish to have it characterized as the property of the Belt Line Railway Company.

Q. 14. What property did you include in your inventory of the property of the Belt Line Railway Corporation as of June 30, 1921?

A. I could not answer that specifically without bringing down here all the records that were made from which the inventory was compiled to make that estimate.

Mr. Davison: It appears that the objection of the counsel for the Transit Commission requires just that production of those papers.

The Master: I think that is quite a proper thing. We have got to know what it was that he measured on. I do not know that he need go into all the details of it, but he can go over his records and classify that there was such mileage of this kind of track and such and such kind of mileage of this kind of track and such buildings with such and such equipment in them.

A. In some respects I can state from the printed report of the Bureau of Valuations of the Transit Commission dated February 15, 1922, what property I included in such inventory, but the report is made up in general by items of property, so that buildings, for instance, would be given there at their value or the value as estimated, but the location and character of those buildings would not be indicated in the report. The report would show what rolling stock was [fol. 265] included and would show the total mileage. The details of such items as buildings or any equipment, I do not believe could be taken from that report in such manner that it could be identified; that is, the character of them, the extent of them, the location of them, I do not believe would be given in full in that report. That is readily ascertainable from the records in the Bureau.

Mr. Kingsbury: In order to save time, I should like to state upon the record that I am not calling for or insisting upon a detailed statement of every single trifling individual item included in the property. But I do want some foundation for the fact that the property which was valued was the property of the Belt Line Railway Company and not property used in common by that and some other road.

The Master: He cannot testify to that. He does not know about the ownership. He can tell us the physical properties that he examined and what they are, in classification and specific enough for your purposes, but rather general. Then, for instance, it would be for the other side to show that that property belonged to the Belt Line, unless you concede it. If it involves the question of who owns it, why, that will have to be beaten out.

A. I can state generally what track we included in the valuation. We included 3.14 miles of single track, conduit track; that is, underground slotted construction on 59th Street from First Avenue to Tenth Avenue.

[fol. 266] We included .96 of a mile of single track, also conduit track, on Amsterdam Avenue from 42nd Street to 59th Street, the track on Amsterdam Avenue, from the sworn statements of the railroad companies, being a joint ownership. It was distributed by the Third Avenue Railroad on the schedules that we received from them—distributed among the companies that operated or had rights on Amsterdam Avenue, and in that distribution .96 of a mile was allocated to the Belt Line and we adopted the schedules furnished by the Railroad Company for that purpose.

On Dey Street, from Washington to Greenwich, there was .04 of a mile of single track, also conduit track, that again being an instance of joint ownership.

On Greenwich Street, from Dey to Vesey Street, .1 of a mile of single track, also conduit, which again was an instance of joint ownership.

On First Avenue, from 34th to 42nd Streets, .45 of a mile of single track, conduit type, which was joint ownership.

On First Avenue, from 24th to 34th Street, .55 of a mile of storage battery type track, which was joint ownership.

And from 42nd to 59th Street, still on First Avenue, 1.73 of a mile of single track, also storage battery type, which was sole ownership. So that the total mileage on First Avenue for storage battery track would be 2.28 of a mile of single track.

On 14th Street from Avenue A to Avenue B, .14 of a mile of single track, conduit type, and .34 of a mile of single track, storage battery type. There were two types, conduit and storage battery; [fol. 267] and the allocation of the storage battery type to the Belt Line was .34, in each instance being joint ownership.

On 23rd Street from First Avenue to Avenue A .11 of a mile of single track, conduit, joint ownership.

On Avenue A from 17th to 23rd Streets, .31 of a mile of single track, conduit type, being again joint ownership.

The total mileage of both types, that is, the conduit type and the storage battery type, being 7.87 of single track.

In the revised summaries which were submitted in connection with the hearings, the .31 of a mile of single track on Avenue A from 17th to 23rd Streets was omitted from the appraisal as it was found to be disconnected track and therefore track that should not be classified as used or useful for operation. It was not being used, and in addition to that, it was disconnected so that it could not be used. The statement as I read the 7.87 is intended to reflect all the mileage included in the printed report. The 7.87 includes the disconnected track. It should be corrected. To get the mileage .31 should be deducted. That would be 7.56. The disconnected portion was deducted in the revised exhibit which was submitted at the hearing on the Third Avenue system.

We included in our estimate of value such rolling stock and other physical property as was allocated to the Belt Line Railroad in the schedule of property furnished by the Third Avenue Railway Company, on which their tax reports are based, the tax reports being sworn reports.

I might say in that connection that the object of our valuation [fol. 268] related more to the value of the Third Avenue Railway System than it did to the value of the component parts. Naturally, the Commission would not contemplate taking over a portion of the system without considering taking over the entire system.

I made these values under the law creating the Transit Commission—Chapter 134 of the Laws of 1921 as amended by Chapter 355 of the Laws of 1921.

In arriving at the value of the property of all the railroad companies, we made an estimate of the value of the Belt Line Railway Corporation. We utilized those tax reports for the allocation of the property of the Third Avenue Railway System, but we made an actual inventory of all the properties. As far as the tracks were concerned, we utilized such surveys as were in the files of the Public Service Commission, the Transit Construction Commissioner or any of the other bodies that preceded the Transit Commission. Where necessary we supplemented those surveys with field work of our own, so as to bring them up to date, during which we made a physical examination of all the track to determine its classification, either as used, useful, or not useful, or disconnected track. At the same time we made an inspection to record its condition.

The rolling stock was inventoried by an actual count, and the cars were examined with regard to their condition, and the buildings were measured except in instances where plans were available, and the plans then were verified. The electrical and mechanical equipment, such as power plant or sub-station equipment, was examined as to condition, scheduled and classified into its component parts—to [fol. 269] which unit prices could be applied. I think that covers all the items of properties—major items, anyway.

Under rolling stock we included as the property of the Belt Line Railway Corporation 24 single truck storage battery passenger cars, three single truck storage battery sweeper cars and one single truck electric sweeper car. That is all the cars that were allocated to the Belt Line. That is all we included in our valuation.

By Mr. Davison:

Q. 38. And then what buildings did you include?

(Discussion off the record.)

The Master: Now I think we have covered the gap, that this question will remain, and attention will be called thereto at the next hearing and the answer will presumably be supplied by counsel.

Mr. Horowitz: I would like to enter an objection to that, if the Court please.

(Objection overruled; exception.)

By Mr. Davison:

Q. 39. What electrical and mechanical equipment did you include?

The Master: The same disposition of that question, that is, that instead of undertaking to dig it out of this thing now, that the question stay unanswered and at the next hearing the witness having gone over it with his counsel, they will present a piece of paper or a statement as to what the identity of this particular item is.

[fol. 270] A. Included in that valuation other than what we have mentioned, there were some underground conduits that were allocated to the Belt Line Railway Corporation, which would follow in their location the trackage as previously given. There was a small amount allocated to the Belt Line Railway Corporation for furniture and fixtures. It is a relatively insignificant amount.

I have now stated generally all the property which we included in the inventory on which I based my estimate of value. I think I have covered it.

Q. 44. What did you estimate to be the value as of prices for the first six months of 1921 of this property included in this inventory as of June 30, 1921?

Mr. Kingsbury: If your Honor please, I wish at this point to enter an objection to this method of attempted proof as incompetent and improper. What counsel is calling for is an estimate rendered by the witness to the Transit Commission, not shown to have been adopted by the Transit Commission in its official functions as charged with a valuation; not shown to have been made by an expert whose qualifications appear on this record, not made under oath and not asked here as an expert opinion under oath.

The Master: As to the second ground, his qualifications sufficiently appear, unless by cross examination you show something or other.

Mr. Kingsbury: But this is a mere estimate rendered in the course of an investigation conducted by the Transit Commission, by one of [fol. 271] its employees, not adopted by it, and not shown to have been made under sanction of an oath in any way, and therefore, it is not even competent as an opinion of value any more than the fact that some real estate appraiser rendered to some third person an appraisal of a third piece of property.

By the Master:

Q. 45. Was the report that you made in this matter to your employees a correct expression of your honest opinion as to the valuations included in it?

A. It was on each one of the three bases that we submitted a valuation on.

(Objection overruled; exception.)

Mr. Horowitz: I make the same objection.

(Objection overruled; exception.)

By Mr. Davison:

Q. 46. What did you estimate to be the value on prices for the first six months of 1921 of this property included in this inventory as of June 30, 1921?

Mr. Kingsbury: I would like to add to my objection also the ground that it does not yet appear that this valuation was placed upon property which the Belt Line Railway owned.

The Master: Of course, if they do not connect it, it will be a proper objection. The objection is also overruled, with an exception. The other side being in evidence if they have not already connected it, it will be necessary — them to connect it, and they cannot very well do that until they know what the items are, until these unanswered questions are answered.

[fol. 272] A. The value of the physical property as inventoried June 30, 1921, based on the average prices prevailing for the first six months of 1921 was estimated at $2,859,754.00 which was exclusive of land allocated as owned by the Belt Line Railway Corporation. That land was appraised by appraisers for the Commission at $531,000.00. That amount of $531,000.00 is in addition to the physical property.

Mr. Kingsbury: I also move to strike out the answer upon the ground that it appears to be based upon the reproduction value of these properties at the time stated and that that has no bearing upon the issues in this case.

The Master: He is going to give us two other theories. This is his valuation on that. Motion denied.

Mr. Kingsbury: Exception.

The Witness: I would like to make it clear that these figures that I give are without depreciation, and based on the cost to reproduce new.

By Mr. Davison:

We estimated the cost of bringing this property which I have described into first class operating condition. We estimated that to be $128,246.00. That represents the amount of money that from our examination and in my judgment was necessary to expend to place the property in first class operating condition.

By the Master:

[fol. 273] Q. 51. That is, in first class operating condition as a piece of property as old as it then was?

A. That is correct.

Q. 52. Instead of as a brand new piece of property?

A. That is correct.

Q. 53. Of course, it would be in first class working condition and still, after several years of wear, it would not be worth as much as it was when it was laid down first? That is, it would not have as long a life, even if it was in first class condition, would it?

A. Its life would be naturally affected.

By Mr. Davison:

Q. 54. In your opinion, this figure of $128,246.00 represents the amount of depreciation to be deducted from any valuation of the property of the Belt Line Railway Corporation in order to arrive at its actual value?

A. Would it be well for me to explain just what those expenditures included before answering that question? Under the caption of the expenditures necessary to place the property in first class operating condition, we explain in our report that that is intended to cover two items, the first being the amount necessary to correct for deferred maintenance of any part of the property, and the second being the amount necessary to correct for what we termed "deferred replacements"; the first item of deferred maintenance being represented by the failure of the company because of lack of funds or otherwise, during the period of the war, or because of high prices, to maintain the property at the same standard of upkeep, the deferred replace- [fol. 274] ments being for the purpose of replacing such of the property as was included in the valuation which we believed could more economically be retired than brought up to proper operating condition.

In our report we also presented for the information of the Commission an estimate of depreciation on a straight line basis. We recommended, however, that the Commission adopt as the fair value of the property the estimate on the original cost——

Q. 56. Mr. Madden, the $128,246.00 which you say was your estimate of the cost to place the property in first class operating condition represents what, in your opinion, is the amount of depreciation to be deducted from any valuation or any basis of valuation?

A. I have testified in other proceedings and we so recommended in our report, that the expenditures necessary to place the property in first class operating condition is the proper basis for the computation of depreciation. I have testified that in my judgment, in my opinion, that is the proper base for computing depreciation—not the straight line basis. The straight line basis for computing depreciation is predicated upon the life of each item of the property, that is, the ultimate life, and then by establishing the number of years in which that item has been in service, to compute the percentage of depreciation.

Q. 60. And it is that method which you say, in your opinion, should not be adopted in valuing these properties here?

A. I would rather answer that as I did before—that in my opinion [fol. 275] the estimate of the expenditures necessary is the proper measure of depreciation.

Mr. Davison: That is all.

The Master: I thought he had two other theories.

Mr. Davison: If the Court please, in my opinion, those two other theories are not relevant or competent here.

The Master: All right. I believe you are right to bring out as many as you wish, and if the other side want more, they can bring them out.

Cross-examination by Mr. Kingsbury:

In determining what properties to include in our inventory, we secured from the Third Avenue Railway Company blueprints of their records which allocated the property of the system by items to each of the companies comprising the Third Avenue System, based on the schedules as therein set up. The Third Avenue Railway Company made a report to the Tax Department and used the allocation of the entire property of the system on the basis of these schedules; and seeing that the tax reports are sworn to and also in view of the fact that we were more concerned as to the value of all the property of the Third Avenue System than we were with the value of any one of its component companies, we accepted their allocations for the purpose of allocating the property of the company. We did not go back of their statements as to what part of the whole should be allocated to each constituent line of the system, or make any independent investigation of that point, except as to the presence of the property itself, and physical existence of the property.

[fol. 276] We made our estimates on the basis of the Third Avenue Railway System, and not of the several lines as separately operating entities, although in our report we showed the separate companies.

In making an estimate of the value of a single company, which is a constituent part of a larger system, the physical property in most instances would be valued at approximately the same amount as when it is included as a part of a larger system, but the cost for overhead and supervision and other items of that character might very well vary. The physical valuation, though, would not be very greatly different. There might be specific instances in which that would not be true. In the construction of a larger system, that is, let us say for the sake of figures, if you had a hundred miles of railroad to construct you could naturally do the work, either yourself or let it under contract at more advantageous terms than if you had, such as in this instance, a small road that traversed over many streets. On the other hand, in the larger system, your supervision and your overhead costs would be very greatly less than they would be for the small system—not per unit, for the whole system. There being a sum for supervision for a hundred miles of road, if you come to the supervision of the individual units, that cost for supervision would shrink because the sum is distributed over them all.

[fol. 277] By Mr. Kingsbury:

X Q. 73. You spoke of having applied three different methods of estimation of value, two in addition to the one which you described in answer to Mr. Davison's questions. What were these other two?

Mr. Davison: Objected to as incompetent, irrelevant and immaterial.

(Objection overruled; exception.)

A. We estimated the value of the property on the basis of the original cost, which was meant to reflect the actual cost of the property during the period of electrification.

In each instance the inventory as of June 30, 1921, was employed; the change in each one of the three estimates being entirely in the price.

The second base was on the average price for each item of property to reproduce new in the period from 1910 to 1914.

The third base was as I explained previously, the estimate of the cost to reproduce new at prices which obtained in the first six months of 1921.

The value on the original cost basis was intended to reflect only the property in existence as of June 30, 1921. We made no estimates of the cost of the original horse car tracks—horse car construction which preceded the property as in existence in June, 1921. The substitution of the electrical structure involved an entire change in the construction—a replacement.

We made an examination of all books and records of the companies [fol. 278] to ascertain the actual expenses at the time of construction. We supplemented that with other investigations to determine prices as of those dates.

The estimate to which I testified in answer to Mr. Davison's question was based on the cost to reproduce new at average prices for the six months up to June, 1921, before depreciation. That was a period of very high prices; abnormal prices, that is, compared to pre-war prices, which are commonly referred to as normal; very much greater than prices when the structures were actually built; and higher than present prices.

I did not testify that in my opinion the proper basis of an estimate of valuation is the cost of reproduction new less expenditures necessary to place property in first class operating condition. We recommended to the Commission that the proper base for the valuation of these properties was to adopt the valuation on the original cost basis and from that to penalize the company with the amount estimated as the expenditure necessary to put the property in first class operating condition.

Mr. Davison: I move to strike out the answer as not responsive. He has asked what, in your opinion, other elements should be taken into consideration to arrive at the value of the property.

(Motion denied; exception.)

X Q. 88. And in estimating values what, in your opinion, is the correct method of applying depreciation.

Mr. Davison: That is objected to as incompetent and calling for a conclusion.

(Objection overruled; exception.)

[fol. 279] A. I have previously testified that in my opinion the proper method to pursue is to make an estimate of the expenditures necessary to place the property in first class operating condition, which would include the correction for any deferred maintenance and also would include the item of deferred replacements. The estimate would have to be based on a physical examination of the prop-

erty, and naturally the age would be reflected in such examination. That was not done in the estimate which I gave to Mr. Davison just now. The total was, as I thought I made very clear, the total cost to reproduce new without application of any depreciation, on the basis of the average for the first six months in 1921.

All these figures are now undergoing revision. They have not been acted upon by the Commission.

In the inventory upon which I acted no properties were included which have since been abandoned and are no longer in use by the Belt Line.

By Mr. Davison:

We did not include properties abandoned previous to June 30, 1921, with the exception of that one instance of .31 of a mile on First Avenue, which I explained previously.

Mr. Kingsbury: That is all of my cross examination.

Mr. Horowitz: I believe that it is admitted that the witness is not an expert on valuation.

The Master: I do not admit it.

Mr. Davison: Nor do I admit it.

Mr. Horowitz: He said so from his own lips. I understand.

[fol. 280] The Witness: I said no such thing. I said I would like to have the record clear that I am not appearing as an expert for the Third Avenue Railway Company but as the valuation engineer for the Transit Commission, and I am under subpœna to produce the records.

The Master: And to testify to facts. He is under no obligation to give an opinion.

Cross-examination by Mr. Horowitz:

I entered the employ of the Transit Commission in May, 1921. At the time that I went with the Transit Commission I was associated with Frederick L. Cranford, Inc. engineers and contractors on general engineering and construction work, as their engineer, doing subway work. At that time the construction industry was rather lax. We were largely at that particular time making bids on proposed work for plants, railroads, bridges, retaining walls, subways. I was engineer there in a general capacity, advisor, estimator, supervisor.

I am a graduate of Columbia University with the degree of Civil Engineer, and have been in the actual practice of engineering for over 20 years. For about 14 years I was employed by the Rapid Transit and the Public Service Commission as Assistant Engineer and Assistant Division Engineer, and had active charge of perhaps $30,000,000 worth of subway work of all types and character, extending from the underground to overhead structures, the reconstruction of all types of surface and underground structures, and the compiling of cost data and all work incidental to the completion of a large con-[fol. 281] struction program.

Following that, I left there to enter the service of the War Department and served as Assistant Director of Construction of nitrate plants, which involved and expenditure of over $100,000,000. on emergency war construction, and in that capacity I was in general charge of all engineering, executive and administration, for the entire project.

Subsequent to that I was associated with Mr. Cranford on contracting work, and continued with him up to the time that I entered the employ of the Transit Commission.

In connection with our subway work we had reconstruction of a great many miles of street railway, on every avenue on which one was located; Lexington Avenue, the original Broadway line, Flatbush Avenue in Brooklyn.

I stated in my answer to Mr. Davison's question that I was retained by Justice Charles E. Hughes, who acted as General Manager for the Merchants Association, for an examination into the values and appraisals that had been made of the street railways both in Manhattan and in Brooklyn and acting as Consulting Engineer for him, I made a study of existing appraisals and made an independent investigation of my own and submitted reports to him as to the values of the properties of each one of these lines. They were used for Judge Hughes' information, information of people who retained him or for whom he was acting.

I have never appraised any street railway property for the purpose of establishing a rate in any rate proceeding. Neither my re-[fol. 282] port to Judge Hughes or my report to the Transit Commission was for rate making purposes. In the case of Judge Hughes we made our reports to him and the course of action to be taken was determined naturally by the representatives of the various civic societies, and it was their judgment that at that time, with the summer coming on, there was nothing to be gained by opening up that question. Subsequently the matter was dropped. As to the Transit Commission, this report has been made to them with our recommendation as to the base that should be adopted, taking into consideration the further requirement under the statute which provides that the Commission must make an estimate of the valuation of the property based upon its prospective earning capacity. That estimate will shortly be presented to the Commission by our Bureau, so that the Commission at the present time is not in a position to pass judgment on these valuations in the absence of the estimate of the prospective earnings. I am revising the estimate of prospective earnings—not the Commission. We are revising it.

X Q. 114. As a matter of fact Mr. Madden, is it not true that your work as construction engineer has simply been in the nature of a general superintendent and the construction of work, having nothing to do at all with estimating the value of the property involved?

A. No, it is very untrue.

Mr. Horowitz: I move to strike out his testimony.

(Motion denied; exception.)

Re-direct examination by Mr. Davison:

When I speak of revising my figures I do not mean merely revising my figures on the report not yet submitted as a basis for prospective earnings. I mean both reports, I mean based on the hearings which were held and the testimony presented to the Commission, there were certain arguments advanced and there were cer- [fol. 283] tain matters brought out in the examination and the cross examination which led us to go back, not to revise our prices, but to ascertain whether there were other—in some instances there were omissions from the inventory of the property, and in a number of other instances there was property included which was improperly classified as properly used or useful for operation, such as this .31 of a mile track that I referred to. Now, the inventory in the case of each company is being revised so as to reflect the actual facts. There has been a change in the inventory of the Belt Line Railway Corporation that would involve a reduction in the figure that I gave you, of $77,000. The figure that I gave you, $2,859,754.00 should be reduced by $77,000. That $77,000 represents the correction of a number of errors that were discovered. I could not give you an idea of what sort of errors they were—not in detail. I think largely that that $77,000 related to cars, rolling stock.

We have completed the revision of the cost to reproduce new and the inventory, to that extent, but it is not in shape to present to the Commission. There is no more revising to be done on that, except of course, the estimation of the depreciation. That has not been completed.

We have continued our studies and kept a chart of the trend of prices since June 30, 1921. I could only answer your question as to how prices at the present time, as applied to the cost of construc- [fol. 284] tion of street railway properties, compare with the prices for the first six months of 1921, by the use of index numbers. Index numbers are intended to reflect the prices for various commodities or various groups of commodities during periods of either months or years, or whatever the case might be, and that information is obtained from various sources and is largely supplied by the United States Labor Bureau. Similarly, information is obtained for labor. Then those prices are applied to the particular class of work which you are endeavoring to value. In the case of the railway properties, for the sake of getting a ready result we employed labor—that is, the index price for labor over a term of years for the period in question; building materials and metals and metal products, and then using those index numbers on the basis of the percentage, that each one would enter into the construction, we started with an index for 100 for 1913 for comparative purposes. That 100 represents the combination of building, building materials, metals and metal products, all properly proportioned to the percentage of each which goes into construction, and then taking, as I explained, 100 as applying to the prices of 1913, the prices in 1921 were 198 and in 1922 were 182. That is, at the present time the comparison between the prices on which we based this estimate of $2,859,750, less $77,000, with the prices of today would be 198

to represent 1921 and 182 to represent today's prices. In order to arrive at the cost to reproduce new this property today the average reduction would be something like 10 per cent.

I believe I answered before that I believed and so testified that [fol. 285] the proper method for computing depreciation was the estimate of the expenditures necessary to put the property in first class operating condition, and I defined what I meant to include in that estimate. Parts of a street railway property are being constantly renewed and replaced.

R. D. Q. 135. So despite the age of the street railway individual items, the entire property, by reason of the replacements and reconstruction going on from year to year, is kept up within a certain amount of what you call first class operating condition; is that not true?

A. That is the intent.

Mr. Kingsbury: I do not want to interrupt, but I am not quite clear yet whether he means that that should be deducted from the estimate of cost to reproduce new or should be deducted from the original cost.

The Master: No, from the estimate to reproduce new.

The Witness: On any base.

R. D. Q. 136. Mr. Madden, if you are taking, in order to arrive at the value of a piece of property, the cost to reproduce new today less depreciation, you would then take your figures of cost to reproduce new and for the depreciation you would deduct the cost of bringing the property into first class operating condition?

A. Yes, at present prices.

By the Master:

Q. 137. And would you deduct anything else? That appears to be the point?

A. Nothing that would not be classified as either deferred maintenance or deferred replacements so as to bring the property to first class operating condition as an operating property.

[fol. 286] Q. 138. Would this $128,246.00 include deferred maintenance and deferred replacement?

A. It was intended to include both of those items.

By Mr. Davison:

R. D. Q. 139. If the costs of overhead vary, as you say, in the construction of a large system as against the construction of an individual corporation such as the Belt Line Corporation. The variance would be that the large system would make it cheaper, would it not?

A. As was pointed out, it should be less per unit over a larger system.

Recross-examination by Mr. Kingsbury:

A railway system which has been in existence for some time is not worth as much, no matter in what good condition it has been kept up, as one entirely new. I believe that the cost to reproduce new, less deferred maintenance or cost to bring it into first class condition would represent the value of the railroad. The cost to reproduce new being theoretical; your question being a reconstruction rather than a reproduction, and to reconstruct the road you would undoubtedly get a better property because you take advantage of whatever advance there has been in the arts, and you would have an opportunity to rehabilitate your line and correct any deficiencies that may have cropped out since your line was in operation, so that reconstruction would undoubtedly give you a better property than to take your property as it exists today and have it in service and rehabilitate it. I am very much opposed to the use of any estimate to reproduce a property new unless it contemplates the reconstruction of that property, and my testimony with the Commission has been very clear on that point, and that is why we advocate the use of original cost as the proper base. In this estimate [fol. 287] to which I testified today I considered reproduction new. It is the cost of reproducing new the property as included in the inventory. If you were to reconstruct that property, my contention is that you would not reproduce it.

R. X Q. 145. Mr. Madden, assuming that the Belt Line Railway Corporation had spent in the first six months of 1921 the amount which you estimated as the reproduction cost, would it have had a railroad of just the same value as the one which it actually did have, or would it have had a better railroad than it actually did have?

The Master: No, you see, the road they actually did have concededly was not as good. It fell $128,000 short.

R. X Q. 145 (continued). After allowing for the $128,000.

A. The expenditure of that amount, as I explained before, would correct any failure of the company to maintain a proper standard of upkeep and put the physical portion of the property in first class condition, in addition to which there was an allowance in there of a certain amount estimated to be necessary to retire some of the existing property and replace it. After the expenditure of that amount and the rehabilitation of the property, the road should have approached the condition of reproducing the property new.

In my opinion the index figure combining labor and materials is still receding, because in some classes of labor——

The Master: Some are going up.

A. The index figure combined for properties of this character, in my opinion, is still receding.

[fol. 288] WILLIAM E. THOMPSON, recalled on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct examination by Mr. Davison:

I have kept track by personal obervations and checks of the volume of street railway traffic on 59th Street since February 1, 1920.

Q. 142. Will you state whether or not the cars which have been operated on 59th Street during the period of February 1st, 1920 to September 30th, 1922 could have carried any appreciable number of additional passengers without increasing the number of cars which would be operated?

Mr. Kingsbury: I object to that. It is altogether too much of a conclusion, your Honor.

Mr. Horowitz: Same objection.

(Objection overruled; exception.)

A. There might have been, of course, individual units in a short space of time when that might have been possible, but the service during the day in covering the three periods which we know as the morning rush and the noon rush and the p. m. rush, no appreciable number could have been carried on the same number of cars operated without very materially detracting from the standard of service which we were giving, which would have been unsatisfactory to the public and perhaps might not have been permitted by the Transit Commission.

I assume the Transit Commission has made checks on the 59th Street line during the period of February 1, 1920 to September 30, 1922. We have received communications from it within that time, but I would not like to say that they contained any tabulations of observations.

Our observations on the 59th Street line show that the cars that are now being and have been operated during the period of February 1, 1920 to September 30, 1922 are carrying all of the passengers that they could carry and maintain the same standard of service that we are giving now. Any increase in traffic, unless the service furnished deteriorated—the cars would have to be added in [fol. 289] the same proportion as the travelling public increased. In other words, the car mileage would increase in the same proportion that the traffic increased.

Cross-examination by Mr. Kingsbury:

No, there are not certain periods of the day when the cars run comparatively light on the 59th Street line—not that I know of, if I understand what you mean by running light. There are certain periods of the day when we are not permitted by the Transit Commission to carry standing passengers. And if you mean light, a car comfortably seated as against a car carrying fifty per cent stand-

ing load, then they are light. The hours of the day in which we are not permitted to carry standees are those in what is known by the Transit Commission as the "non-rush hours." The non-rush hour varies on different lines. The further down town you are the earlier you get your rush. For instance, your rush hour down in the lower end of Manhattan would begin at four-thirty—certainly at five o'clock. Those same people would not be distributed on the uptown lines for half to three-quarters of an hour, so you cannot define generally the rush hour. You have to apply it to different lines and different locations. The rush hour on 59th Street begins about four-thirty, because of the shopping and theatre riding. The rush hour for the home going crowd begins about five-thirty and lasts until about seven-thirty. In the morning it begins about six-thirty and runs to eight-thirty and then there is a slight lull and then there is the white collar brigade that we take care of for the next hour.

The requirements of the Transit Commission in regard to not carrying standing passengers are not communicated to us in written orders. We have never had a Commissioner who would put himself on record as to the standard of loading of any car. I have [fol. 290] never known any Commissioner who would. It is a matter of regulation; perhaps not in your construction formal, but in arriving at what would be a satisfactory service it has been generally conceded, without anyone's being willing to go on record, that in non-rush hours if you furnished seats for passengers the service was satisfactory, and provided you did not carry more than 150 per cent loads with occasional exceptions as a result of unusual event, that that was a satisfactory service.

X Q. 155. But you do not have definite hours prescribed for this service?

A. The hearings were held for weeks in this last investigation by the Transit Commission, on exactly that same subject, and the Commission conceded that it would not gain anything by undertaking to define the exact load standard of different lines at different times of day on different days of the weeks, on different weeks of the month, and different seasons of the year.

X Q. 156. So that it is a matter of general and continuous supervision and not of definite rules and regulations which are promulgated to you?

A. The Commission continues its supervision, I assume, just as the Company does, we make—

X Q. 157. Can you not answer my question yes or no?

The Master: Read the question.

(X Q. 156 read.)

A. By whom?

X Q. 158. By the Commission?

A. No.

X Q. 159. That is, it is not a matter of definite rules and regulations.

A. I have just stated that.

There is a seasonal variation in traffic, according to my observations. The travel on 59th Street is lighter in the summer than during the other seasons. I think—I am not positive—but I should [fol. 291] think July would be about the lightest month. I said I thought travel is considerably lighter in July and August.

Redirect examination by Mr. Davison:

R. D. 165. Mr. Thompson, in these hearings concerning service, about which you just testified, were there any standards of service which were prescribed by the engineers of the Transit Commission?

Mr. Kingsbury: I think this witness is not competent to testify to that.

Mr. Davison: I think he is.

The Master: It may have been in writing, and if so, the writing is the best evidence.

Mr. Davison: I will ask him first "were there any standards" and then I will ask him whether they were in writing.

The Master: I will let him answer that question yes or no.

R. D. Q. 166. Were there any standards?

The Witness: Your Honor, before I answer that yes or no——

The Master: We do that, because if they were in writing you cannot testify as to what they were. We have got to have them.

A. No, they were not prescribed.

R. D. Q. 167. Were there any standards stated by the engineers of the Transit Commission as being desirable?

The Master: In the engineer of the Transit Commission (I am not familiar with the statutes, you know) one who speaks by authority? Is it not the Transit Commission that decides the standards?

Mr. Davison: All he does is to advise the Transit Commission.

(Argument.)

The Master: Certainly this witness cannot give any statements of what engineers said at the hearing when there are stenographer's minutes of the hearing in existence.

[fol. 292] Mr. Kingsbury: I do not think it would be competent anyway because it is what the Transit Commission itself prescribes and not what some witness called before it testifies, that would be controlling.

The Master: Of course, that does not make a regulation. I think we all understand that.

(Recess.)

(Mr. H. H. Hertzoff and Mr. Herbert S. Worthley appear for District Attorney in place of Mr. Horowitz.)

Mr. Davison: In connection with Exhibit K, now in evidence, I offer in evidence petition of Belt Line Railway Corporation to

Public Service Commission, First District, State of New York, dated October 1st, 1919, together with revised page No. 1 and revised page No. 9 of the Tariff of Belt Line Railway Corporation thereto annexed.

(Marked Plaintiff's Exhibit BJ.)

Mr. Davison: In connection with Exhibit L, I offer in evidence petition of Belt Line Railway Corporation to Public Service Commission, First District, State of New York, verified February 1920, stamped as "Received by the Public Service Commission February 24, 1920" together with revised page No. 1 and revised page No. 9 of the Tariffs of the Belt Line Railway Corporation annexed thereto.

(Marked Plaintiff's Exhibit BK.)

Mr. Davison I offer in evidence letter of Alfred T. Davison, general counsel, Belt Line Railway Corporation to James Walker, Secretary, Public Service Commission, dated May 22d, 1920, together with first revised pages Nos. 2 and 3 and second revised page No. 9 of Belt Line Railway Corporation Tariff therein enclosed, the letter being merely a letter of transmittal.

(Marked Plaintiff's Exhibit BL.)

Mr. Davison: I offer in evidence petition of Belt Line Railway Corporation to Public Service Commission, State of New York, First [fol. 293] District, sworn to May 18th, 1920.

(Marked Plaintiff's Exhibit BM.)

(Mr. Kingsbury stipulated on the record that the minutes of the hearing quoted on page 47 are the minutes in the hearing referred to in the order which is Exhibit S.)

By Mr. Davison:

I have made or caused to be made observations and checks showing the travel on the Avenue B line of the Dry Dock, East Broadway and Battery Railroad Company so as to determine the points of greatest and least travel.

The northern terminus of the line is 59th Street and the Post Office is the southern—59th Street and First Avenue. That is the line which runs south on First Avenue from 59th Street to 14th Street, and then from 14th Street it goes south through various streets to the Post Office. We have checked it twice. The first one was on Wednesday and Thursday, June 14th and 15th of this year and the last one was on Wednesday and Thursday, November 8th and 9th, 1922.

Mr. Kingsbury: If your Honor please, I wish to note an objection against any testimony about this line as not a part of the plaintiff's system at all.

Mr. Davison: I will state that the only purpose of this proof is to show that whatever losses the Dry Dock Company sustained in its

operations on the Avenue B line cannot be attributed to the portion of the line below 14th Street, which is not the franchise of this Company. The Dry Dock is operated under the franchise of this Com-
[fol. 294] pany north of 14th Street, and I want to show that that operation is more unprofitable north of 14th Street than it is below 14th Street.

Mr. Kingsbury: But this is not a part of the operation of the Belt Line Railway Corporation at all.

Mr. Davison: It is part of the operation of the franchise of the Belt Line Railway Corporation, and it is the Belt Line Railway Corporation doing it.

The Master: I will take the testimony and see what it is worth.

Mr. Kingsbury: Exception.

Mr. Hertzoff: Exception.

These checks taken in June were at Clinton and Delancey Streets, First Avenue and 15th Street, and First Avenue and 42nd Street, cars going northbound, on both streets. The last checks taken in November were at the same points, going north. This statement correctly sets forth the result of the checks taken on June 14th and June 15th at the three places I have named.

[fol. 295] Mr. Davison: I offer it in evidence.

Mr. Kingsbury: I specifically object to the exhibit on the same ground as stated.

Mr. Hertzoff: Same objection.

(Objection overruled: exception.)
(Marked Plaintiff's Exhibit BN.)

The Master: Do I understand that the Dry Dock passenger transfer over to the Belt Line under this system of five cents?

Mr. Davison: No, sir, the Dry Dock has a free transfer.

This paper correctly sets forth the results of the checks taken on November 8th and 9th at the three points I have mentioned.

Mr. Davison: I offer that in evidence.

(Same objection, ruling and exception.)
(Marked Plaintiff's Exhibit BO.)

The northbound traffic which is shown by Exhibits BN and BO represents the trend of traffic both ways. In other words, the traffic going north comes south. The north and south traffic are practically the same, on that line.

[fol. 296] Recross-examination by Mr. Kingsbury:

This Dry Dock, East Broadway & Battery Railroad is one of the constitutents of the Third Avenue System. It is not a part of the Belt Line Railway Corporation, but it operates a part of the Belt Line franchise. I do not know how it does so whether under lease or in what way.

Redirect examination by Mr. Davison:

The parking of automobiles at the side of 59th Street necessitates the vehicles using the center of the street—that part of the street in which the tracks are laid. There is not room between the tracks and the curb when cars are parked there; there is barely room to park the car between the car and the curb. If a car is parked, there is no possibility of getting another car between the car and the parked automobile. Between Fifth Avenue and Columbus Circle, there is room to pass the car with an automobile parked against the curb. On the north side of 59th Street between Fifth Avenue and Columbus Circle parked cars are backed into the curb. When they are backed into the curb there is not room for a car to pass between the car so parked and the street railway tracks. That forces the cars to use the track area in passing parked cars. It slows down all the traffic—more than on 42d Street.

WALTER FARRINGTON, recalled as a witness on behalf of the plain-[fol. 297] tiff having been previously duly sworn testified as follows:

Direct examination by Mr. Davison:

I have made a study of the car mileage and expenses of the various railway companies comprising the Third Avenue Railway System with reference to a comparison between increases in car mileage or decreases in car mileage and increase or decreases in cost of operation of the various companies. This has covered the period from the year ending June 30, 1913 to June 30, 1922, with the exception of the year ended June 30, 1917. That was an abnormal year—the year of the strike—and the cost of operation was very much in excess of the normal cost of operation; so that I eliminated that year entirely. Except for that year, my study covers the past ten years.

I have found that on the average the expenses increased in the same proportion as the mileage, increased.

I have prepared a statement showing the income from operation of the Belt Line Railway Corporation for the period, February 1, 1921 to September 30, 1922, as compared with the income for the same period, adjusted on the basis of carrying the same number of five cent and two cent passengers as were actually carried during the period of February 1, 1919, to September 30, 1920. In preparing such statement, the operating expenses for the period, February 1, 1291 to September 30, 1922, have been increased by 21 per cent. The 21 per cent represents the increase of passengers carried in the period, February 1, 1919 to September 30, 1920, over the passengers carried during the period, February 1, 1921 to September 30, 1922. [fol. 298] This statement correctly sets forth the statement of the income from operation during the last named period, adjusted on the basis of carrying the same number of five cent and two cent passengers as were carried in the former period.

Mr. Davison: I offer it in evidence.

Mr. Kingsbury: I object to it as incompetent, irrelevant and immaterial and as founded on an assumption upon which there is no basis of proof whatever.

Mr. Hertzoff: Same objection by the District Attorney.

(Objection overruled; exception.)
(Marked Plaintiff's Exhibit BP.)

In Exhibit BP I have not made any attempt to take into account the additional cost of operation laid over the entire service if it was slowed up by the operation of a greater number of cars.

Cross-examination by Mr. Kingsbury:

I did not say that the expenses of operation varied substantially with the number of passengers carried. I testified that expenses increased about in the same proportion as car mileage.

X Q. 140. That is different from the number of passengers, is it not?

A. If there is any appreciable number of passengers carried, why no, that is the mileage will be increased.

X Q. 141. The mileage will be increased in precisely the same proportion as the increase in the number of passengers?

A. Practically so.

X Q. 142. So you make no discrimination between the long hauls and short hauls?

A. No sir, I have not here.

[fol. 299] X Q. 143. And yet you have such variations in your actual operations, do you not?

A. Yes, sir, we have.

X Q. 144. If you got a very large increase in short haul passengers without any corresponding increase in long haul passengers, your car mileage would not increase proportionally with your passenger increase, would it?

A. It might.

X Q. 145. How?

A. Well, I am not familiar enough with the operation to go into that.

In making my adjustment of operating expenses, I used the total expenses as a whole. The decrease in the expense of both labor and materials comparing the period between February 1, 1919 and September 30, 1920, on the one hand and the period, February 1, 1921 to September 30, 1922, on the other was not a substantial decrease. There was a decrease. As far as the wages of the conductor and motorman, there was about practically a ten per cent. decrease. I cannot give any percentage of decrease in the cost of materials. There was a decrease, however.

In making these studies of the expense of railroad operation, I have included idle car mileage. An illustration of that is a car going back to the barns with no passengers on board.

In the items "Maintenance of Way and Structures" in Exhibit BC and Exhibit B D, the principal elements are roadway and track

expenses. That means repairs to roadway and track. That includes both labor and material. There has been a decrease in both of those [fol. 300] items which is reflected in the difference between the two periods. I cannot tell whether that item is affected to any substantial extent by the requirement or absence of requirement of transfers.

The item "Maintenance of Equipment" in Exhibit B C and Exhibit B D, is made up principally of labor and materials. The decrease shown there is partly accounted for by the decrease in the unit price of labor and materials. I cannot tell whether that item is affected to any substantial extent by the presence or absence of transfers.

The item of "Power Supply" is not made up directly of labor and material. That is the straight power charge. It is paid to the Third Avenue Railroad, the parent company. I cannot say to what extent that is affected by the presence or absence of transfers.

In the item "Operation of Cars" there is included besides wages of motormen and conductors, salaries and expenses of superintendents, what we call our miscellaneous expenses which we cannot distribute to any other charge then the operation of the cars—a slight expense in comparison to the wages of the motormen and conductors. The wages of motormen and conductors make up the principal factors in it. I cannot say about what percentage of the whole is composed of the wages of motormen and conductors. I should not like to answer at this time the question whether the ten per cent. decrease in wages between the two periods would account for practically the whole of the difference between those two items. There is a difference in the decrease of the wages between the two [fol. 301] periods. Ten per cent. of $330,000 is $33,000. Subtract this from $333,000 and you get just about $297,000.

The item "Injuries to Persons and Property", includes the payment of damage claims made against our company, and salaries and expenses of attorneys and investigators. That may be affected by the presence or absence of transfers. It would depend upon the effect of the increased riding, and so on. I cannot attribute any particular effect on that to the presence or absence of transfers.

In the item, "General and Miscellaneous Expenses," we include in there the officers' and clerks' salaries—general officers' and general clerks' salaries and expenses, telephone charges, expenses which we cannot distribute to any other operating account—overhead administration that cannot be distributed otherwise. There is very litle difference between those two periods in respect to that item. I cannot tell whether any part of that difference is to be attributed to the presence or absence of transfers.

In the item of taxes, earlier period $71,658.92, later period $80,352.33, the real estate tax assessment may have been increased; the rate may have been increased; it may have been anything of that kind; I do not know. I do not know whether it includes additional property assessed to us which was not included in the earlier period.

We hired service cars from the Third Avenue Railway Company. Hire of equipment means service cars, that is, passenger cars, I can-

not tell how large a proportion of the whole number of cars which [fol. 302] we operated were hired. I do not know offhand whether the difference in "Hire of Equipment" earlier period $50,915, later period $47,984, means that we hired more cars in the earlier period, or that we paid a higehr rate for them or what.

In considering the difference between the total operating expenses as between the two periods, I am not able to say approximately how much of the difference is due to the decrease in the price of labor and materials.

The principal reason, I would say off-hand, for the increase in the item "Rent of Buildings and Other Property" which for the earlier period is given as $36,641.27 and for the later period as $73,970.78 was due to a very satisfactory lease which was made to outside parties of some of the real estate which the company owned. That was in effect during the latter period and not during the earlier period. That had nothing whatever to do with the transfer system.

The slight increase in advertising in the later period over the earlier period had nothing whatever to do with the transfer system.

X Q.—At what time during the period shown by these two statements was the East Belt Line discontinued? * * *

The East Belt Line is included in our receipts in the early statement, and there is no reference to the East Belt Line in the later statement.

Mr. Davison: Exhibit H, Colonel Kingsbury, shows that that abandonment was authorized on April 17th, 1919. It became effective June 3d, 1919. Mr. Thompson, tells me, and he is in charge of operations, so he would know.

[fol. 303] X Q. 198. I also note, in comparing these two exhibits, that there is a very large drop in the number of passengers on the West Belt between the earlier and later period, the earlier showing 1,410,848 passengers and the later showing only 77,735 passengers. Do you know at what time, if at all, the operation of the West Belt was discontinued?

A. I do not know the time.

Mr. Kingsbury: Are you willing to state that at this stage of the record?

Mr. Davison: Yes. Exhibit I shows it was authorized on March 22d, 1921, and Mr. Thompson states it was actually discontinued March 24th, 1921.

Mr. Davison: The only purpose of these exhibits B C and B D, Colonel Kingsbury, was to take the same period, reasons and everything, after the discontinued operation as before.

Mr. Kingsbury: I understand, it was to make a comparison of two corresponding periods.

Mr. Davison: Exactly, so that the months and the seasons could be the same.

In Plaintiff's Exhibit B H, the year ended June 30, 1921, included twelve months, through part of which the transfer system was in operation and through the rest of which these particular transfers to which this suit relator had been discontinued.

Mr. Kingsbury: Five months without transfers and seven months with, is that correct?

Mr. Davison: Yes.

[fol. 304] X Q. 200. Where the three months' period to September 30th, 1922, shows a decrease in the net revenue as compared with the year ended June 30th, 1922, that is to be accounted for in part, is it not, by the smaller traffic during the summer months?

A. It is a three months' period against a twelve months' period.

X Q. 201. I mean, it shows in certain cases, I think, a relative decrease. It does cover, does it not, the summer months necessarily?

A. July and August are summer months.

X Q. 202. And those are less profitable months than the rest of the year?

A. I would not say they are less profitable, no sir.

The Master: Less passenger intake?

By Mr. Davison:

Q. 203. Less passenger revenue?

A. Less passenger revenue, yes.

Referring to Exhibit B H, where the year ended June 30, 1921, gives for Maintenance of Way and Structures $99,737.68, and the year ended June 30, 1922, gives for the same item $43,789.63. I cannot tell how much to attribute to the discontinuance of transfers. I cannot as to any of the items under the operating expenses, taxes, and so forth, I cannot even to the extent of indicating a relative proportion.

The item $173,149.86 period March 22, 1913 to June 30, 1922, in the figures at the bottom of Plaintiff's Exhibit B H accumulated deficit from operations, is the compilation of the deficit from opera- [fol. 305] tions for that period and also retirement of capital charged to surplus. Of that item $9,492.43 represents the income item charged to surplus for the period March 22, 1913, to June 30, 1920; and $162,657.43 are retirement items charged to surplus. In reaching that income deficit I took into account the payment of interest on bonds and the amortization of bonds. If that were eliminated, it is possible that there would be an actual operating profit.

The item, "As shown by Income Account July 1st, 1920 to September 30th, 1922, $37,409.83," is the accumulated deficit from income for the period, July 1, 1920 to September 30, 1922. That includes no retirements of capital. In reaching that I took into account the interest on bonds and bond amortization. If interest on bonds and bond amortization be eliminated, that period would have shown an excess of operating revenue over operating expenses.

Mr. Kingsbury: Mr. Davison calls my attention to the fact that the amortization item applied only to bond discount and not to the principal of the bond. I am glad to have the correction made plain on the record.

The last item of this statement of accumulated deficit, "Through Property Retirements, etc. period July 1st, 1920-September 30th, 1922, $225,666.71," includes a $150 charge, an adjustment on a previous year's transaction. The rest was all for property retirements.

In the case of the Belt Line there was no reserve account set up to take care of retirements of capital; that is to say, if the company had been charged depreciation from time to time, the credit to the [fol. 306] depreciation charge would have been a reserve for depreciation, against which reserve when property was retired, the said retirement would have gone in that reserve account. Therefore, there was no reserve set up and the charge went direct to the surplus account. If a car was actually sold or destroyed, burnt up, for instance, or was no longer in our possession, we would charge off a certain value representing that car as a retirement of capital. That is what I mean by retirement. That is, taking the value of that car out of capital account.

These retirement figures were fixed entirely by our own company's officers and experts. I do not know whether the Belt Line Railway Corporation ever filed with the Public Service Commission or its successors any rule for determining deterioration or depreciation. I do not know whether they were ever asked by the Commission to do so. These items which enter into the accumulated deficit, so far as they represent retirements of capital, were not computed upon the basis of any rule filed with the Commission or laid down by it.

Redirect examination by Mr. Davison:

The capital represented by the track in that part of the East Belt which was abandoned pursuant to the declaration of abandonment, Exhibit H is represented in these figures of retirements that I have testified to on Exhibit B H. The retirement of the capital necessitated by the abandonment of the West Belt pursuant to Exhibit I is included in these retirements of capital. I do not know offhand how much is included for each. It constitutes the larger portion of the retirement.

(Adjourned to December 1, 1922, at 10.30 o'clock a. m.)

[fol. 307] New York, December 1, 1922—10.30 a. m.

(Adjourned to 2.00 o'clock p. m. same day.)

New York, December 1, 1922—2.00 p. m.

Present: The Master; Mr. Davison and Mr. Scoville, for Plaintiff; Mr. Kingsbury and Mr. Stover, for Transit Commission; Mr. Fertig and Mr. Hertzoff, for District Attorney.

[fol. 308] WALTER FARRINGTON, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct examination by Mr. Davison:

I have made a compilation of the price of power and the various elements of cost going into the construction of roadway, track and the maintenance of equipment as well as wages of conductors and wages of motormen both in the year 1913 and at the present time in the year 1922. This statement correctly sets forth those costs compiled from the record of the Belt Line Railway Corporation. It is a compilation of the prices that our company paid. This also applies to the prices paid by the other companies comprising the Third Avenue Railway System. They are the same. I have also set forth here the percentage of increase in 1922 as compared with 1913.

Mr. Davison: I offer it in evidence.
Mr. Kingsbury: I object to it as irrelevant and immaterial.
The Master: That objection is overruled; exception.

(Marked Plaintiff's Exhibit B Q.)

Mr. Davison: It is stipulated by counsel, subject to correction (and I am reading now from receipted tax bills for the year 1921 paid by the Belt Line Railway Corporation), that the assessed valuation of the real property of the Belt Line Railway Corporation, Sec. 4, Vol. 2, Block 1082, Lot 14, Location Tenth Avenue between 53rd and 54th Streets, is $830,000.00; and that the assessment for the year 1922 is the same, subject to verification.
[fol. 309] The Master: What is that; a building?
Mr. Davison: Land and building.
Mr. Fertig: That is, the total building regardless of what use it may be put to.
Mr. Davison: Yes.

Cross-examination by Mr. Kingsbury:

The building, the assessed valuation of which has just been testified to, is not used entirely and exclusively for car operation purposes. Part of the building is rented out to outside firms and corporations not engaged in the street railway business. I do not know what proportion of it is devoted to street railway business and what proportion of it to other purposes; I cannot tell. I could make a calculation so that the next time I come I can answer that question.

I will have to answer later the question as to how much rental is annually received from those portions of the building not used for street railway purposes at the present time and for the past three years.

In preparing Plaintiff's Exhibit B Q, I limited my examination of the prices or costs of the various items to the two specific years, 1913 and 1922. I have knowledge as to 1920. The 1920 figures were in almost every instance higher than the 1922 figures. I should

say that the approximate percentage by which they were higher in 1920 than in 1922 was between 7 and 10 per cent roughly. On the average there was a continuous rise between 1913 and 1920. Since 1920 there has been a substantially continuous decline to the present time, or to the time that that schedule covered in 1922.

[fol. 310] Cross-examination by Mr. Fertig:

I believe there are stored in the car barn cars belonging to companies other than the Belt Line. I cannot tell how many tracks are there in all; I do not know. To the question whether the greater part of them are used for certain cars belonging to other companies, I will say yes. I cannot answer the question whether the greater part of the floor space is not used for storing cars.

Redirect examination by Mr. Davison:

You did not understand me to say, in comparing the prices in 1922 with those of 1920, that at all times between 1920 and 1922 prices went down. I said "on the average," I think. I do not know whether prices went up in 1921 as compared with 1920, because I did not examine the 1921 prices. There has been a decline since 1920 to the present time. There has been a fluctuation upward during that period. What I meant to bring out was that on the average between 1920 and 1922, we showed declining prices. I mean that 1922 shows a decline over 1920.

R. D. Q. 256. But has the decline been continuous since 1920?

The Master: If you cannot answer without looking up your records, perhaps you had better reserve the answer until you look and see.

A. I cannot tell.

The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company stores cars in the barn of the company at 54th Street and 10th Avenue. They pay rent for that. The rental that [fol. 311] the Belt Line Corporation receives is shown in these exhibits which I have testified to in this proceeding. Whatever the revenues of the company are purported to have shown, those revenues include the rent from the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company. And whatever rent, which I am going to testify to definitely, is received from other tenants of the building, those revenues are included in all revenue that I have purported to give in these exhibits.

Recross-examination by Mr. Kingsbury:

I know what caused the considerable reduction in the amount of rentals received, as indicated by the statement which was put in evidence in my former testimony in regard to the result of operation for the three months, July, August and September of the current year. We had a tenant using part of our 54th Street barn during the year ended 1920, who no longer occupies the property. That is

now vacant. I know that the tenant is not there, and therefore we are not charging nor receiving any rent. The tenant was the Truck Company of America. It defaulted on the lease. I do not know just what the actual proceedings were, whether there were dispossess proceedings or not. They quit. There has been no new tenant as far as the books and records show.

Recross-examination by Mr. Fertig:

The years referred to in Exhibit B Q are fiscal years, covering the fiscal years ending June 30, 1913, and June 30, 1922. These are book figures for the Belt Line.

[fol. 312] I do not keep continuously in touch with prices; I do not study them.

I do not know who the Truck Company of America is. I know they are not affiliated with the Belt Line system or the Third Avenue system.

I cannot tell you as to the basis of charge for tenants in the 54th Street car barn. I do not know who can give you information on that subject as to the amount of relative space, as to which I could not give you any specific information. We have records in our office as to the space occupied and as to the basis of the charge for rental. I can arrive at that for you, and the relative space occupied.

[fol. 313] CHARLES E. HALL, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testifies as follows:

Direct examination by Mr. Davison:

Referring to the statement of allocations, given to Mr. Madden, showing what tracks belonged to the Belt Line Railway Corporation on certain streets, I think the originals were probably transmitted with a letter by Mr. Ryder; the details of the tax report for the year ending December 31, 1920. Later, Mr. Dixon of Mr. Madden's office came up to our office and I handed to him a similar statement for the year ending December 31, 1921. We first handed him a statement as of the year ending December 31, 1920. Subsequently we handed him a statement as to the year ending December 31, 1921. That is the last statement we gave him. Between these two statements, the Belt Line had abandoned track. In the second statement, the abandoned track is not included.

Confining my answer to the statement as of December 31, 1921, we stated to him the underground electric track on 59th Street from First Avenue to Tenth Avenue—the total miles of single track, 3.159. That is the entire mileage of single track on that street. We gave that as all owned exclusively by the Belt Line Railway Company. No other company operates across those tracks; not in this particular portion of 59th Street. Between First and Second Avenues, the Second Avenue Railroad operates. They do not own it. We own it. I believe there is a lease from the Belt Line Railway to the

Second Avenue. I do not know just what form of agreement there is. The distance on 59th Street between First and Second Avenues is about 750 feet, a little less than one-quarter of a mile, two-tenths of a mile, about 1,500 feet of single track. The mileage we gave to Mr. Madden as belonging to the Belt Line Railway Corporotion on 59th Street was 3.159.

[fol. 314] On Amsterdam Avenue from 42nd Street to 59th Street there are 1.652 miles of single track. We did not give to Mr. Madden or his assistant any statement of what portion of the track belonged to the Belt Line Railway Company; we simply indicated that the 42nd Street Company was jointly interested with the Belt Line Railway Company in that section of the track, and gave no definite distance. In the values it was divided equally but not by us.

We gave to Mr. Madden a statement that there were tracks belonging to the Belt Line Railway Company on Tenth Avenue, the entrance track at 54th Street car barn, the entrance tracks to the car barn and the crossover north of 54th Street, .077 miles of electric track. Tenth Avenue and Amsterdam Avenue are the same. There is other track on Tenth Avenue. The entrance to those barns is owned exclusively by the Belt Line. On Tenth Avenue from 59th Street to 42nd Street, which is jointly owned with the Forty-second Street Company, the total underground electric track is 1.652. That is all the underground electric track owned by the Belt Line Railway Corporation.

The storage battery operation on Tenth Avenue from the branch-off to the car barn is .018—from the tracks in Tenth Avenue to the car barn, the branch-off to the car barn, from the track to the barn.

On Tenth Avenue across 42nd Street it is .054.

On Corlear Street, Cherry Street to Grand Street .249.

On Fourteenth Street from Avenue C to Avenue B .319.

On First Avenue from 42nd Street to 59th Street, it is 1.768; that is underground electric track, but it is operated by storage battery cars.

[fol. 315] On First Avenue from 33rd Street to 34th Street, .022.

On Dey Street from Washington Street to Greenwich .036. That is underground electric track. It is not operated by the Belt Line.

On Greenwich Street from Dey Street to Ninth Avenue, .102. That is on a joint franchise with the New York Railways Company.

On Jackson Street from Cherry Street to Monroe Street, .032. Do you want all the New York Railway joint track first?

Q. 54. Yes. You better pick out those.

A. On First Avenue, between 28th, 29th and 34th Streets—the single track comes into a double track there—that is with one of the New York Railway companies, the Twenty-third Street Railway. That is .546.

On Avenue A from 17th Street to 23rd Street, with the Central Crosstown Railroad Company, .558.

On 23rd Street from First Avenue to Avenue A, with the Twenty-third Street Railway Company, .268.

The other companies are companies of the Third Avenue system: Forty-second Street, Manhattanville & St. Nicholas; on Tenth

Avenue from 59th Street to 54th Street. That is included in the item I testified to on Tenth Avenue from 59th Street to 42nd Street, 1.652.

Jointly with the Dry Dock, East Broadway and Battery Railway Company, on 14th Street from Avenue A to Avenue B, .246 miles.

With the same company on First Avenue from 23rd Street to 24th Street, .134 miles.

[fol. 316] With two others, the Mid-Crosstown Railway Company and the Dry Dock, East Broadway and Battery Railroad Company, jointly with the Belt Line, all three having franchises, on First Avenue from 24th Street to 28th Street and 29th Street. It went to the switch points on First Avenue, where the 28th Street track came to where the 29th Street track came in. I am dealing with two tracks, and on one track you go from 24th to 28th Street switch point and with the other track you get from 24th to the 29th Street switch point, and I add the two together. That is .446 miles.

That covers all of the track of the Belt Line Railway Corporation. Those are the figures we reported to Mr. Madden.

Cross-examination by Mr. Kingsbury:

When I spoke of so many miles of single track on 59th Street, it is the equivalent length of single track. Every case where I state "single track," there may be a double track in the street, but it has the equivalent length of single track. None of the track I have just testified to has been abandoned since this schedule was made up. We sent two different statements to Mr. Madden. There has been nothing abandoned since the second one.

Cross-examination by Mr. Fertig:

I do not know what Mr. Madden did with what I have just read into the record. We gave him that.

I can give you the portions of the sections that I have just read into the record as having been given to Mr. Madden, which are unused by the Belt Line road. I can get the used portions by subtracting. The total is made up by giving the total and then showing how much is unused.

[fol. 317] 59th Street is all used from First to Tenth Avenue, also the entrance tracks to the car barn and the crossover, .077 on Tenth Avenue.

The Belt Line operates on Tenth Avenue down to 54th Street, down to this crossover on 54th Street. The Belt Line operates on Tenth Avenue from 59th Street to 54th Street. That is all the track of the Belt Line that is operated by it—over which the Belt Line is itself running its own cars.

As for the operation on Tenth Avenue between 59th and 54th Streets and the crossover, that is jointly used with the Forty-second Street, Manhattanville & St. Nicholas Avenue Railroad Company.

The Belt Line is not operating any storage battery cars on First Avenue.

I have not the figures for the mileage abandoned on the East Belt Line. That was abandoned previously. For the West Belt Line it was 8.831 miles of single track. I should say that the mileage abandoned on the East Belt Line was about 10 miles.

The statement that I read into the record did not include the East Belt mileage nor the West Belt mileage. That is, none of it that was abandoned.

Redirect examination by Mr. Davison:

The Dry Dock, East Broadway and Battery Railroad Company operates on First Avenue from 59th to 14th Street. It has a franchise over that street for a portion of the way, from 21st Street to 34th Street. I was not told about those franchises; I have looked them up in the franchise records kept by our company.

[fol. 318] Mr. Fertig: I would like to state an objection on the record, that that is not a competent way to prove it.

The Master: Do you want them to bring the original franchise? Is there not somebody in your office who is competent to check up with those records?

Mr. Fertig: We will check it up; but as respecting the City, I did not want to acquiesce in any statement of franchise rights without verifying it.

Mr. Davison: If your Honor please, I have a copy of a memorandum from Mr. Madden to Mr. Stover, which gives the items included under "Land & Buildings" and "Electrical & Mechanical Equipment," which Mr. Madden was to supply.

The Master: Suppose you mark that for identification, and let the other side look over it.

(Marked Plaintiff's Exhibit B R for identification.)

Walter J. Quinn, called as a witness on behalf of the plaintiff, being duly sworn testifies as follows:

Direct examination by Mr. Davison:

I am associated with the Belt Line Railway Company as electrical engineer. I have been since 1918.

I gave to Mr. Madden items or figures in connection with the property of the Belt Line Railway Company. I gave him the information on the feeders and ducts and the substation equipment in the 54th Street car barn. Exhibit B R for identification is an outline of the equipment. I gave him those items. I gave him a [fol. 319] complete inventory of the equipment, which, of course, is more extensive than that, but that is an outline. I gave him items of ducts and feeders. They are not included in Exhibit B R for identification. I gave him an item of 42,812 feet of million circular mil lead covered cable and an item of 19,722 feet of half mil lead covered feeder cable. I gave him an item of 139,040 feet

of tile duct and 121,517 feet of cement line duct, where the Belt Line Company was the sole owner; and an item of 183,382 feet of tile duct and 46,593 feet of cement lined duct in places where the Belt Line Company was part owner. Those places are practically a repetition of what Mr. Hall has recited. Including Exhibit B R for identification those are all the items I gave Mr. Madden. These ducts and feeders are located in the streets where the Belt Line Railway Company has tracks, with the exception of some cables which are on Third Avenue from 59th Street to 66th Street, where they go to the Third Avenue Company substation, to get from the substation to the ducts on 59th Street. These are ducts for power.

Cross-examination by Mr. Fertig:

I got the items that I have just read into the record from measurements made by men from my department. They have been made at different times in the past ten years. I could not tell when the last one was made. That measurement of 42.812 feet of lead covered cable was made about 1914, I should say. I was then with the Third Avenue Company as Assistant to the Chief Engineer.

These cables are the cables that take the power from one point to another point. The cable is just a little longer than the distance from the sub-station to any particular location, to the section of any particular street. If you know the length of the duct you know the length of the cable, as long as the cable keeps operating. You do not go out and measure these cables all over again when you are told to find about it.

[fol. 320] The sub-station at 54th Street and Tenth Avenue is not now being used for generating power. It is not used at all. It is not being used for anything.

The ducts and cables that I have testified to are not all used for the 59th Street operation. All of the cables are, but not all of the ducts. An equivalent number of duct feet as compared with the length of the cable are used for 59th Street; I mean the same number; approximately the same number.

(Adjourned to Monday, December 11, 1922, 10.30 o'clock a. m.)

[fol. 321] New York, December 11, 1922—10.30 o'clock a. m.

Present: The Master; Mr. Davison and Mr. Scoville, for plaintiff; Mr. Kingsbury and Mr. Stover, for Transit Commission; Mr. Fertig, for District Attorney Banton.

JOHN H. MADDEN, recalled, having been previously sworn, testifies as follows:

Cross-examination by Mr. Fertig:

In my experience with the Commission before the War I was limited almost altogether to work in connection with subway contracts

and administration of the work under the contract, which included both tunnels and subways. I did not compute the complete cost of any subway tunnel, including labor and material and overheads during that time.

Prior to my work with the Commission—prior to 1902—I did computing of contract work, I handled the work complete with Charles W. Leavett, Landscape architect and engineer in private practice. Part of the work we did with our own force and other under contract. I had charge of the construction work and also all work in connection with the contract and the making of the contract while with Charles W. Leavitt. I do not recall that any of this work was railroad work. I would not at this time describe the im- [fol. 322] portant kind of engineering work done with Mr. Leavett, it was twenty years ago. We did work of great many descriptions. I recollect a retaining wall at Woodlawn Cemetery, bridges in Woodlawn Cemetery and some pavement. I was six or seven months on general work of that character. I brought together the costs of this work. Coming back to my work with the Commission prior to the War, it was supervisory work. I was in active charge of the work, directed it. I was in responsible charge of the work. I had to deal with prices. the estimates were paid over my signature, over my initials, the estimates originated with me. That had to do with money, in addition to that we kept elaborate records of actual cost of doing work by items of work. I had nothing to do with the negotiations [fol. 323] preceding the making of contracts as far as prices were concerned, that was done by the Contractor.

R. X Q. 177. And you did not do it for the Commission?

A. Except in a general way. The Commission makes up a preliminary estimate for the purpose of asking appropriation. I want to be very fair in this. I was often consulted with reference to the prices to be applied to that estimate, but that estimate had no bearing on the Contractor's estimate. That was for the information of the Commission I made no detailed estimate for the job for the Commission.

In a great many instances while the job was going on I put together the details of the costs for reports to the Commission. This was incidental to the job, otherwise I would not make a report to the Commission, it was the major part of the work and primarily my job to put together the details of the costs for reports to the Commission.

In connection with subway contracts there were surface railroads entirely reconstructed in places as on Upper Broadway and on Lexington Avenue the road was entirely torn out and rebuilt. I was in responsi' le charge of that work for the Commission. I had something to do with paying for it, supervising the job or seeing that money is paid according to the amount of construction done gives the observation, the opportunity for observation to collect actual cost data.

The Master: And it would depend on how many particular jobs he was on and how exhaustive the information he gathered was.

The Witness: It would be difficult for me to say as, to the size of the surface railway work, I could not attempt to say how much it was in money, or make an offhand estimate. I only reported costs when they were requested by the Commission or by some of the Engineers for a specific purpose but the field forces kept accurate figures as to the cost of the various items of work involving force [fol. 324] account, inventory of plants, tools and materials.

By Mr. Fertig:

R. X Q. 198. You kept track of the cost in that way?
A. Yes.
R. X Q. 199. Of the work under You?
A. That is correct.
R. X Q. 200. Were you responsible for those costs?

The Master: What do you mean by responsible for those costs?

R. X Q. 200 (continued): To report them to the Commission?
A. I have answered that before.
R. X Q. 201. For cost determination?
A. I answered that before. This had nothing to do with cost determination.

The Witness: I have not had anything to do with the design and purchasing of cars and other rolling stock generally. In my work with the War Department I had to do with the design and installation of power plants. We installed at Muscle Shoals a 90,000 k. w. power house which included a 60,000 k. w. unit a replica of the Interborough 60,000 k. w. unit at 74th Street. This is the only power plant I had to do with by way of design or installation. On this work I was assistant Director of construction for the War Department, as such I was in charge of the engineering, administration, and the executive force for the three air nitrate plants and the central office in New York. One of my functions was to expedite the work, which had all been contracted for before we went there, as far as prices were concerned; I had nothing to do with them. The Government required of all its departments a complete property accounting and we set up in great detail the costs by items of [fol. 325] property. That was done under by supervision. I did not participate in the detail work, and as to the prices that was done by men under me. I was responsible for the methods and compilation of data and for signing the document as responsible officer of the War Department. Prior to that I had no experience with reference to design or supervision of power plants. Like all engineers I was familiar from visits and inspections with power plants. The return that was made to the War Department prepared under my direction as assistant director included the Muscle Shoals project in which were included all classes of buildings, railroads and electrical and mechanical equipment representing an expenditure of $70,000,000 including the unit costs set up.

[fol. 325½] I was associated with Judge Hughes as consulting engineer for the purpose of a review and of finding as to the valua-

tions of the New York Railways System and the B. R. T. surface lines. I made an appraisal of the two systems, I made no field appraisal, I accepted the records and spot checked them. I made an independent valuation of the property using the inventory and applying my own prices, the working force was supplied by the firm of Banks, Haig & Lindars, at times the force would be not over ten and at times only Mr. Lindars and myself. The property appraised was about one hundred million dollars. We were engaged over a period of seven months. I devoted about 50% of my time to it so that in about three and one-half months I appraised in the way I described, one hundred million dollars worth of property. Giving in detail the amount and character of the work I did I would say that out of each week I put in at least three full days, in addition to perhaps conferences in the evening at least twice each month with Judge Hughes and the Committee.

By Mr. Fertig:

It would be difficult for me to state in dollars how much of the one hundred million dollars worth of property I did spot check. Spot check means taking certain portions of the property, certain portions of the inventory as a check and go out and actually locate that and verify its existence. I visited car barns and power houses. I visited some points where there was track to determine its condition. I visited some points where there was special construction I wanted to see; to sit down and put that in dollars and cents is quite beyond my reach at this minute.

I examined the power houses of each one of the surface companies. The plant of the New York Railways Company at 96th Street has been out of operation for six years.

[fol. 326] As for track you cannot get a fair estimate of the condition of the rails by a small amount of spot check. You would have to go over all of this. My spot checks were in connection with extensive reports on hand. In our valuation on rolling stock we look at every car. My main work there was putting prices on the inventory that was there. I was engaged to price it. Outside the 96th Street power house I appraised some power plant equipment, several power houses of the B. R. T. lines in Brooklyn. The Williamsburg Power House for instance, I think that was included, I do not know what was done with the results of my work, I made my report to Judge Hughes and that is all I know. The report was not made public. I know that Judge Hughes reported to his employers, The Merchants Association. The main part of my work with Frederick L. Cranford, Inc., has been in estimating on contracts. I did the estimating with Mr. Cranford and Mr. Meen. Each made independent estimates. I suppose we have bid on maybe twenty subway contracts since I have been with them.

R. X Q. 269. You say "we." Did you figure on them yourself?

A. I have explained just what my function was.

The Master: Figured on them with the other two.

R. X Q. 270. Yes. What railroad jobs were those?

A. Well a subway is a railroad.

The Witness: Part of a subway job includes the reconstruction of street surface railroads in connection with the work, the maintenance, support and reconstruction of the street surface railroads, it is an important part of the work to figure on the cost to restore a surface line to the position it was in before it was dug up. I cannot answer the question in dollars as to how many blocks of street surface lines of that kind that were involved, it would make no difference if it were only one block the data you need for that one would be just the same as it would be for twenty. I did not say the data you would get, I said the data you would need to prepare your [fol. 327] bid, the same elements of work enter into it including overhead. We did not bid on any surface lines purely and simply, that was an item of work in connection with subway contracts, I cannot tell you just what I did on the biggest job we bid on that had to do with surface lines, I could not pick out the biggest job that contained the most street surface railroad. Picking out a characteristic one, one that gives an illustration of what work it required to be done, what figuring, you take each element of work that enters into that item and apply to that a unit, let us say per lineal foot, per square yard, per cubic yard as the case might be, apply to each element that enters into that unit, prices, which will when assembled indicate the cost of performing that particular item of work. To take the reconstruction of a street surface railroad, you would have to estimate the rails, you would have the conduit, the paving, your slot rail, your concrete and you take the quantity for a unit for instance per lineal foot of each one of the items and apply the price that would be sufficient in your judgment to install or complete that work. Assemble the various items of cost and you get the cost of your finished product.

R. X Q. 289. You have described that generally. Will you take up a specific case, a specific characteristic case? You can have your own pick.

A. Yes, but I do not understand what you mean by a specific characteristic case. Take Lawrence Street, for instance. We did that on Lawrence Street, just exactly what I said.

R. X Q. 290. Just what did you do? Give us the details.

A. I gave you the details.

By the Master:

R. X Q. 291. Lawrence St., Brooklyn?

A. Lawrence Street, Brooklyn, yes. What more details do you want than I gave you?

[fol. 328] R. X Q. 292. Take Lawrence Street. Just how many blocks were there involved there of street surface line?

A. I would rather put that in feet. I would say something over one thousand feet.

R. X Q. 293. Tell us the features of that particular job and please be as specific as you can.

A. Could I be more specific than I was a minute ago?

By the Master:

R. X Q. 294. Repeat what you have already said with regard to this and add anything else to it that occurs to you. As I understand the answer to the former question, you have the 1,000 feet. That would give you 1,000 feet of rail I presume, and 1,000 feet of slotted rail, and then how much square feet or yards, whatever it is of paving, and go on and give the details on that in Lawrence Street as well as you can recollect them.

A. That is just exactly what we did. We took per lineal foot. You do not bid *of* this by a lump sum. You bid on it so much per lineal foot and separated the construction into such items as I explained before, rails and ties, and pavement and concrete.

By Mr. Fertig:

No we did not want a thousand feet of rail, the bid is on the basis of per lineal foot and whether it was 1,000 or 10,000 feet did not enter into it except as to arithmetic. I am trying to make clear you take the quantities per lineal foot of track and compute the cost per lineal foot of track for each item and that is the price you use so that it is per foot and not per thousand feet.

Naturally the length of the job would have something to do with your unit of cost. The information that you need to prepare your bid would be the same for one foot as for a thousand feet or twenty thousand feet. Your bid price for ten feet would naturally not be [fol. 329] the same as your bid price for a thousand feet but the information you would need for the ten feet would be the same as you would need for the thousand feet or a thousand miles.

The information required in that particular case was the quantity of each class of material that entered into the work and the price that should be applied in order to arrive at the cost of it. Of the twenty jobs I bid on with the Cranford people we got the one job at Lawrence Street. I do not know how many competitor bidders there were on the Lawrence Street job.

By Mr. Fertig:

R. X Q. 308. Leaving rails for a moment and coming to rolling stock on street surface lines, you would not say your experience—I am confining myself now to the Frederick Cranford estimates—would have any bearing on the rolling stock involved in the work that you did for the Commission?

A. I tried to make it clear before that I make no claim to have any expert knowledge as to rolling stock or electrical or mechanical equipment, but knowledge of that kind is not of any great importance, because an appraisal is always made on the basis of manufacturers' quotations and also actual prices that are paid for the rolling stock and the electrical and mechanical equipment, which can be ascertained from an examination of the books of the company.

By Mr. Fertig:

The figures I gave in this case on the Belt Line properties are a part of an appraisal I made for the Transit Commission which totaled something over $700,000,000 including the City's investment in subways.

The work on this appraisal was started when I reported to the Commission on May 9th, 1921. My report was published under [fol. 330] date of February 15th, 1922, this was not intended to be a final report. It was for the purpose of presenting the facts to the Commission as we knew them. Hearings were to be held on it and we intended to revise it to conform to any facts ascertained through the hearings or subsequent examinations. There was a statement in this report that it was not final, I said so very specifically, I would not pretend that there were not errors both of omission and commission; the $700,000,000 worth of property was given at that figure on the basis of original cost, it called for a great deal more than the certain kind of work I did in connection with Judge Hughes, it required a detailed inventory and appraisal. Every bit of property with the exception of $300,000,000 of the City's investment was appraised. Really the detailed appraisal that we made was about $450,000,000. Yes, that was a rather large job for the time, we employed 140 men. I do not know offhand of any other such job done within this space of time.

On the rolling stock on which I do not pretend to be familiar I relied on some one under me, this was Mr. Kohler, an engineer with the Commission a number of years, and associated with him was the pick of the car equipment and inspection staff of the Commission. I would like to make it very clear that an appraisal of rolling stock is largely a matter of administration, a matter of direction. In performing the work we checked first every car and got its number, then we examined a per cent of each group to ascertain its condition in the course of which the cars themselves were identified. The costs in most cases were taken from the records of the Company of actual payments and quotations on file, from manufacturers which can be readily checked. There is nothing involved or intricate requiring [fol. 331] vast technical knowledge of an expert character to make an appraisal of rolling stock, under the conditions that I explained.

Any valuation is simply a matter of completing an exact inventory—that is administration, as far as prices are concerned you need some technical knowledge but even these are ascertainable. I do not confine myself to rolling stock. I am confining myself to any valuation, the only stock in trade you need is a knowledge of prices.

The Master:

Q. 333. I understand he was speaking of rolling stock and electrical equipment, of which manufacturers are constantly giving out the prices at which they are selling it. That is, as I understand it. It seems quite evident, if you are going to estimate on a cost basis if you know your unit and you know what the manufacturers are

asking for it, I should think an intelligent high school boy could get the results?

A. That is exactly what I said.

The Master:

Of course, some of the cars may have deteriorated and that is a matter of inspection.

By Mr. Fertig: I do not think depreciation is a simple question, I have yet to find a man that can make depreciation or its treatment simple. I do not think it is complicated in the sense that it is an involved question.

I put in a reproduction cost of cars at request of counsel in this case, I am here under subpœna to present the facts and I presented just what I was asked to present. As a matter of fact a car 20 or 30 years old is not being reproduced now. We took cars and electrical and mechanical equipment of an out-of-date type and ascertained its original cost or if the exact original cost was not possible, building upon the original cost basis, we applied prices, which took into con- [fol. 332] sideration the increase in the price of both labor and material that entered into this class of equipment and taking a percentage basis for each one of those quantities, we arrived at what we felt would be the cost to reproduce that car today if we were going to reproduce it. I have not advocated and am not advocating the cost of reproduction theory. That is a mechanical method of figuring reproduction which does not correspond in my mind with any reality, that is to say I would not reproduce that car today. They have some very modern cars which would not come under the same category I was discussing.

R. X Q. 342. As far as possible, Mr. Madden, so that the record is clear, I would like to take this up in regular order. We will come to depreciation later on. As to Mr. Kohler. Did he figure depreciation on cars too?

A. Yes, we figured depreciation on a straight line basis. That again is mechanical of course. Of course, if the life of the car is fixed and if you know the age in service, that simply becomes a matter of arithmetic, that is all.

Mr. Kohler was my major assistant on rolling stock, Captain E. T. Fitzgerald, Mechanical engineer, graduate of Annapolis, major assistant on electrical and mechanical equipment,—at the present time he is mechanical engineer for the commission,—first on appraisal work at the time B. J. Arnold was retained by the Commission.

R. X Q. 344. Can you give us in any details the experience of Capt. Fitzgerald and Mr. Arnold also?

A. No. I said I think it was with Bion J. Arnold that he was connected when the valuation was made by the Commission may be ten or twelve years ago.

By Mr. Fertig: My major assistant on land values was Chas. D. Clendorf, formerly Assistant Corporation Counsel and an expert, I

understand, of the Corporation Counsel's Office for a great many years on real estate condemnation proceedings. Is that correct?
[fol. 333] R. X Q. 346. I do not understand that he was an expert.

The Master: He was an assistant Corporation Counsel.

Mr. Fertig: Handling real estate matters.

The witness: Under Mr. Olendorf was a force of eight or nine experts who appraised the land by boroughs, these men being selected because of their expert knowledge in that particular borough.

My organization was divided into three groups, the first was rolling stock, the second electrical and mechanical equipment and the third track and structures: this last had to do with buildings and was under H. J. Alexander, who has been with the Commission a number of years as assistant engineer on subway work prior to that engaged in railroad work. That covers the main groups. I fixed the overheads myself. As to the 54th Street car barn Mr. Ruland covered the land. Mr. Alexander the building, the commission requested the real estate experts to also include in their report the value of the building from the real estate man's point of view.

The Master: Had not that appraisal better be marked for identification? (Discussion.) I suppose nobody disputes the fact that the book before us is an accurate replica or duplicate or whatever you might call the report to the Commission that has been spoken of. It does not make a particle of difference to my mind which party puts in an essential exhibit.

This report made to the Commission, dated Feb. 15, 1922 is marked in Evidence Exhibit B S.

You can put as memoranda, in here so there will be no future difficulty that this is done at the suggestion and in fact at the insistence of the Special Master as convenient for himself when com-
[fol. 333½] ing to read the testimony after the close of the case and is not considered as being put in by either side.

This entire volume is coming to me before I decider the case.

On the argument on my report if it is desirable for any judge to see it, he will ask for it and if it need be presented, by agreement of the parties certain pages will be inserted inthe record.

Mr. Fertig: Will your Honor permit me to state what, after careful thought, we have considered to be the wishes of counsel and so that I may not put myself in a position that will jeopardize any of my rights? If your Honor will permit me to say to this witness: "Will you read into the record the various figures for the respective classes of property upon the basis of original cost that you used in reaching the figures that you put into the record", and then have these pages read into the record as his answer.

The master: I should prefer the witness make his own answer to the question at the proper time.

Mr. Fertig: Your Honor, he would undoubtedly answer that these were the figures. There is not any question about that.

The Master: I cannot see the slightest improvement of your suggestion over the one I have made, which seems to me to be entirely simple and with the statement which I have made on the record,

certainly you are not prejudiced before any Court as having put this in the record, and therefore bound by everything in it, which of course, you would not be in the Federal Court anyhow, I do not know what might happen to you in some State Court.

Mr. Fertig: I will note my exception, and we will go on.

The Master: Yes.

[fol. 334] By Mr. Fertig:

The Witness: At page 152 of Exh., B. S., I have "Broker's Fees for Marketing Securities for the Belt Line Corporation, $160,682." That was intended to include only the property included in our inventory. Property abandoned prior to June 30, 1921 was not included. It includes property off of 59th Street Line. It does not include property not operated at all, with the exception of one line.

By the Master: You say operated by the 59th Street Line. I though it was the Belt Line Railway. I did not know that the 59th Street Line was the title of that corporation. Do you mean the Central Park, North and East River? I cannot make out what you are asking, whether it is operated by the old road that I used to know as the Central Park, North and East River Railroad or whether it is operated by this corporation which is now here before me called the Belt Line Railway or whether 59th Street is simply a phrase that applies to where the railroad is.

Mr. Fertig: It is more than a phrase, it is the issue involved in this case. If I may be permitted to make a statement, the issue in this case concerns the carrying of passengers upon the so-called 59th Street Line, which is the carrying of passengers upon cars at various points from 59th Street and Second Avenue to 59th Street and Tenth Avenue and then down Tenth Avenue to 54th Street. That is the property, as I understand it, that is involved in this case and no other and what I am trying to get out of the witness is this:

[fol. 335] Does the $160,662 cover broker's fees for marketing securities of property other than what I have just stated?

The Witness: Of course, that includes the electrical and mechanical equipment that is in the substation at 54th Street and Tenth Avenue. It includes the land and building on the west side of Tenth Avenue from 53d to 54th Streets. It includes certain track on Amsterdam Avenue from 42nd Street to 59th Street, on Dey Street from Washington to Greenwich Street and so forth the sum of which would appear to be in the vicinity of three quarters of a mile of single track, the record of the last hearing will give these amounts. All the isolated instances of track off the territory referred to by Mr. Fertig I would estimate at three quarters of a mile.

By the Master:

Q. 365. Mr. Fertig has referred from 59th Street and Second Avenue to Tenth Avenue and down Tenth Avenue to 54th Street and this witness has told us about an item outside that territory which ought to come up, to three quarters of a mile.

A. I was referring to conduit track not storage battery track. In addition to that, there would be about, I would estimate, about three miles of single track largely located on First Avenue.

By Mr. Fertig:

I do not know how much rolling stock would apply to any particular portion. The total for rolling stock of Belt Line Corporation, on basis of 1921 prices is $204,900.

[fol. 336] R. X Q. 368. Is any of that used on what we will call the 59th Street Line?

A. It was on June 30th, 1921.

By the Master:

Q. 369. What was the answer?

A. It was on June 30th, 1921, which was the date of the inventory.

By Mr. Fertig:

R. X Q. 370. Are you sure of that, Mr. Madden?

A. If the 59th Street Line is operated by the Belt Line Railway, this was the portion of the property of the Third Avenue Railroad that was allocated to the Belt Line Railroad by the Company.

R. X Q. 371. Yes, but Mr. Madden——

A. I prefer to say that I cannot answer that question.

R. X Q. 372. You do not know?

A. I do not know.

By Mr. Fertig:

Coming back to broker's fees for marketing securities we got the figure $160,000 by taking 7%—I am not certain whether it was 7% or 7½%—of the total appraised value. It is the practice to capitalize brokerage fees for marketing securities. I am in favor of amortizing the amount over the life of the property and so advocated in my report to depreciate all overheads including brokerage. The purpose of a depreciation fund is to amortize the original investment. I know of cases before commissions and courts where it was permitted to capitalize brokerage fees for marketing securities, that is before the Public Service Commission in the First District. I think I would be safe in mentioning any case that has come up there in [fol. 337] capital proceedings. I know that it is and has been the practice of the Commission. I am not acquainted with just what the proceeding would be in a rate case. I am an engineer and that is all I claim to be, as to the practice with reference to capitalizing brokerage fees or any other matter of that kind. I feel that that is out of my province. In this proceeding I classify myself as a valuation engineer, that is my title and as such I am prepared to justify any sum of money I included in the valuation of the Belt Line property. I am prepared to testify as to the reasons for including brokerage fees but when a distinction is drawn between the proceeding for

acquiring property, as the report states, and a rate case, then I say that is something I do not feel I should discuss with you.

I see a distinction in a rate case but this valuation is for the purpose of acquiring property and has no connection with any of the intricacies that come into a rate proceeding. If it was for a rate case perhaps certain of these things might be different, perhaps they would not—I do not know.

I am prepared to justify that figure for the purposes of acquisition; for the purposes of rate making I will say I do not think I am called on to give any testimony of that character, because I am not here as an expert.

The Master: I do not remember (of course my memory may be faulty) that the witness was examined here on that line as an expert, was he? I thought he was examined as to the fact as to whether [fol. 338] certain things had been reported to the Commission. I may be all wrong about it. I have not read his testimony since it was taken.

Mr. Kingsbury: You asked him Your Honor, whether the figures which he put in his report represented his honest opinion.

The Master: At the time he put them in.

Mr. Kingsbury: At the time he put them in.

The Master: Of course, that implied under the circumstances under which the report was made. They did not quote anything in it, in the making of the report to the Commission, except for the purposes for which they requested it, to wit the acquisition of the property.

By Mr. Fertig:

The Witness: I did not mean to say that in my judgment the reproduction figures of 1921 was the value of the property for rate making. The figures apply to this situation, these figures were for the purpose of acquiring the property. To the extent that I have indicated, my figures with reference to rolling stock and various classes of property cover property not alone in connection with the 59th Street Line but other parts of the Belt Line Railway. There is no way of telling from the figures in the report how much is applicable to 59th Street Line, without going to the underlying data. I do not feel called upon to give you the figures applicable to the 59th Street Line. I would not say that the items and the totals [fol. 339] which have been given have no application to the 59th Street Line but I would say there are other properties beside the 59th Street Line included.

I do not believe in reproduction cost figures, we recommended that the valuation should be based on original cost.

Reproduction involves the idea of an identical plant, the building of a thing as it is, whereas reconstruction involves the idea of substituting a similar plant with all the modern improvements.

The term depreciation should include not only wear and tear but obsolescence as well, and for such particular item of property there

is involved not only wear and tear but some obsolescence so that the proper amount to be deducted for depreciation must include obsolescence.

R. X Q. 406. Take the building, the car barn. Did you allow for any *obsolescence there at all*?

A. I think not.

By Mr. Fertig:

We figure depreciation on two different bases, one we class as the expenditure necessary to put the property in first class condition, the other is depreciation on the calendar basis. We give them both. I think the proper way of fixing the amount of depreciation to be deducted for finding a value is to deduct the amount necessary to put the property in first class operating condition. In connection with the valuation of properties, subways and elevated, under Contracts 3 and 4 we followed the provisions of the contract for setting up depreciation. The contracts do not specify the percentages to be applied; they specified that depreciation reserves were to be set up, we [fol. 340] then accepted the latest suggestion from Commissioner Delaney as to the percentages to apply for depreciation. That was because of the contract requirement, we had no choice.

By Mr. Fertig:

I have here, on p. 148 of Exhibit BS, the original cost of the properties of the Belt Line Corporation $1,831,659; Of that amount $531,000 is for land which of course is not the original cost of the land, and $275,812 for shops and car houses.

On page 149 is shown the original cost of that building less depreciation. The original cost less depreciation is $158,812; The reproduction figures on basis of 1910-1914 prices $370,876 and for 1921 prices it is $759,756, that is on the basis of prices of the first six months of 1921. After deducting depreciation on basis of 1921 prices, that is $436,756. That is depreciation on the straight line basis.

I have not seen this car barn recently. I have seen it within five years. I would assume its condition today would approximate that, if there has been any failure to maintain it, it might be somewhat different today than it was then.

I would not for a moment consider paying such a sum of money $759,000 for such a building so located, I think the estimate is perfectly proper but I object to the theory. That is one of the cases where you would not reproduce the building.

[fol. 341] I figured it would cost $10,000 to put that building in first class operating condition. The building was put up along about 1887 and originally used for horses. The floors are wooden and they are worn from the use they have been put to, during the horse period. It is five years since I was there. I know for similar buildings that the floors are wooden and rotted. I did not visit this building for this valuation—I could not tell you the weight the floors

would sustain without having the design. There are a number of these car barns where upper floors are used for shops of various characters. The cars are kept down on the ground where they belong and can be easily handled. One hundred pounds per square foot is a light load for a building of that character. As to how I worked out $10,000 as the amount to meet the requirements for operating conditions, I can only tell you in a general way I did not work out the $10,000—instructions to the field force were to record the condition of the walls and floors and other parts of the building and so that an estimate could be made of whatever repairs were necessary. I do not know the details of this $10,000. These figures are being revised and whether this $10,000 remains at $10,000 I do not know. That is something I want to look into, in fact the estimate has not been made. This $10,000 is included in the sum I deducted as the total depreciation and is a sum I know nothing about personally. The amount is open for further consideration by the Commission. The $10,000 did not take into account any obsolescence. This $10,000 was entirely for deferred maintenance.

[fol. 342] If we were going to reproduce the 59th Street line I think we would use slot construction, whether or not you would use the identical type would be a different question. Overhead trolley is more economical and trackless trolleys may be developed. I think it would be a very profitable district for busses.

By Mr. Fertig:

Obsolescence should include more than mere physical obsolescence. There are various means of treating obsolsecence and it depends on the proceeding as to how depreciation is treated. In figuring the value of a railroad you must take care not only of the physical wear and tear, but all the other causes that go to diminish the value of the property by reason of the fact that they do not render the services for which they were intended as well as they did, which is reflected in this valuation by the estimate of prospective earnings. The value of any property is the cost of building it or rebuilding giving consideration to the estimate of what the property would fairly earn in the future to justify an investment of that amuont.

By Mr. Fertig:

The item of paving appears in Exhibit BS, on page 142, 1921 basis.

We received from the Chief Engineer of the Highways bureau in each borough the prices for pavement for each year from 1890 to 1921 and then after we established the year in which the work was done we applied these prices, the 1921 prices were used to reproduce the pavement in 1921.

Most of the paving is performed by the Highway Department and billed to the Companies.

[fol. 343] The cost of paving varies by the type of pavement and location, it varies in boroughs.

We figured depreciation on pavement. I did not do it myself it was done under my direction, I saw a great deal of this property. On

the 59th Street Line I saw some of the intersections, if you asked me where I would not be able to tell you. I recollect being in that vicinity. We depreciated the pavement in this report with the life that was assigned to that pavement, that is, on the pavement within the railroad area; on off line pavement we depreciate it on the life of the ducts. The assumption is that the City will maintain it. The life assigned depends on the character of the pavement. We established what we felt to be the proper life for different classes of pavement and depreciated it on that basis of life as straight line depreciation, regardless of its actual condition. The estimates of expenditure to put into first class operating condition considered the actual condition of the pavement at the time the inspection was made on straight line depreciation.

On page 152 Exhibit B. S. is shown $332,000 as the cost of paving inside railway area on 1921 price basis before depreciation. On page 153 the same less depreciation is shown as $166,115 which indicates that half the life of the pavement was expended. On page 152 for paving outside railroad area $34,218, on page 153 the correspond- [fol. 344] ing item, less the depreciation is $17,110. The deduction of 50% as depreciation does not apply to all railroad pavements. The Third Avenue system was created about all at one time so that with small exceptions the depreciation applied would be uniform. The method of computing the depreciation was that there was a life assigned and the pavement was depreciated on the percentage basis of its expended life. Whether that happened to be a half or not, I do not know.

By Mr. Fertig:

I did not personally inquire to find out if any part of the car barn at 54th Street was used by the 59th Street Line. We were concerned in a valuation of the Third Avenue Railway System, of which the Belt Line was a part and we accepted the allocation of property as made in the sworn tax reports of the Third Avenue System as being a part of the Belt Line Railway. We accepted the sworn reports of the Third Avenue System that land and building belonged to the Belt Line Company. The figures given for the Belt Line Company have application to the 59th Street Line, but they include other parts of the property than the 59th Street Line. I do not know what proportion of that car barn was used for 59th Street operation. Assuming as a fact that the car barn has four floors and that only the ground floor is used for storing cars and that out of the nineteen tracks six are used for the 59th Street cars I would not say that this would not lay the basis for allocation of what part of that building was used for 59th Street. I would not accept that without [fol. 345] further examination. Some such unit as car miles might perhaps more nearly reflect the situation as to allocating the cost over separate parts of the line. Assuming that you had a building proper for the system you would come down to the portions of the line that would require the use of that building. A line that operated more cars and more miles should necessarily have more of the expense

because of the greater revenue it would derive. That suggestion is, in my opinion, better than the first one, it is just a suggestion, I might give two or three more.

R. X Q. 536. Under removal of obstructions p. 153, you have $190,-020 for the Belt Line Railway Corporation?

A. That is on the basis of 1921 prices?

R. X Q. 527. Yes.

A. I do not want to interrupt you Mr. Fertig but every time that this is broached, of course, I want to make clear that that is not my recommended valuation.

R. X Q. 528. Right and I want to make clear it covers more than the 59th Street line.

A. We understand each other perfectly.

By Mr. Fertig:

The item removal of obstructions embraces the alteration of any subsurface structures such as sewers, water pipes, electric ducts that [fol. 346] might interfere in the construction of the railroad. You find the obstructions there and have to remove them to build the line. Sometimes it is removed temporarily and then restored in some other location. This was originally a horse car line and the tracks were laid, I guess about 1880; they were electrified, in the City generally from 1900 to 1905. I will not confine myself to 59th Street, there was some before 1900—I rather think the Belt Line was closer to 1900. The removal of obstructions as far as the old horse car lines is a matter of slight consideration because that simply involved going down maybe a foot below the surface. The conduit type of underground trolley carries through down at least thirty inches and in cases of the old cable roads considerably deeper than that. As a general rule the electric conduits have only about sixteen inches of cover, the gas pipes twenty inches and water mains as a rule three feet. Once you started below a foot or fifteen inches needed for the horse cars you ran into the expense of removing these obstructions.

I have no doubt that if water pipes and other pipes were there, they were laid under the horse car lines. The expenses as far as the removal of obstructions would not be on 59th Street, but they would be at every intersection that you cross, where you intersected the north and south street and interfered with the subsurface construction in these north and south streets. I personally outlined the method of computing these quantities, the prices were based on records from the books of the company in earlier investigations of the Public Service Commission in 1912 or 1913.

[fol. 347] By Mr. Fertig:

We made a study of typical cases to which the removal of obstructions would apply and based on that study, we arrived at a unit and that unit was employed in connection with the unit prices that I have previously referred to that had been collected in the past by the Commission. I would have been tickled to death if I could find out

definitely the obstructions that were there, if I could have gone out and located these things. That was an estimate I made. I would not call it arbitrary. I would call it an estimate—an approximation. I can not explain in words what the unit was, other than that it was a typical case, then taking these typical cases and estimating the cost of making the changes, we arrived at a unit price per intersection, we took similar cases in between blocks and arrived at another unit per lineal foot and made an estimate, these estimates were based on track as applying to the particular cases I make no pretense that they were any more than an estimate.

[fol. 348] By Mr. Fertig:

There is no way, from the data in Exhibit BS, of segregating to the 59th Street Line the amount of interest during construction $134,284 shown on p. 153. This was the interest on expenditures for physical property during construction. It was computed at a rate per year over the period of construction. The statement in the report under the Heading Third Avenue Railway System is "It was assumed that the total construction period would consume three years and the overhead charges to be defrayed by the Company during construction were computed accordingly." I did not assume that the 1921 prices would prevail throughout the three years' period. The cost to reproduce method assumes that the railway is completed over night. The cost to reproduce method assumes that the railroad is non-existent during the period you adopt your price. The interest for three years is a capital charge. The price that you apply to your units to get the cost to reproduce, your overhead, must extend over the construction period. In testifying to brokerage fees I got that information from what I considered to be leading brokerage houses in New York. I had had no experience whatsoever in that. They knew full well the purpose for which I was getting the information.

So far as land is concerned we used the value appraised by the real estate experts as of June 30th, 1921, which was intended to represent the market values of that date. We used that figure for each base uniformly of course that is not the original cost of the land. We stated in the text of our report that we considered land, materials, and supplies to be a commodity that the Company could dispose of at its present market value.

By Mr. Fertig:

To recapitulate as far as these classes of property is concerned [fol. 349] none of the detailed work of this report was performed by me personally with the exception of the overheads. As to depreciation the actual computation was done by subordinates, the life table I approved. I participated to that extent in everything. I accept responsibility for everything that is in there with the stipulation, of course that I am perfectly confident that there are errors of commission and omission.

By Mr. Fertig:

I explained in detail the method that was pursued in estimating to place property in first class operating condition. The instructions were quite uniform that the information to be secured must be in sufficient detail to permit an estimate to be made of the cost to repair the structure in its existing condition. The floors would not be reinforced under the estimate but would be restored to first class operating condition. The instructions were very broad and general. If I wanted specific information as to how I arrived at a figure I would have to go to the working papers.

With reference to rolling stock when it came to the matter of deferred replacements necessary to put the property in first class operating condition we made a number of studies including the operating cost of cars set up against the weight per passenger and the fare per passenger, the type of cars, and all the elements that entered into a proper operating unit. We went back to the practice before the war with reference to retiring cars, so that from our study it would appear that if during those six years the company had either set up reserves to replace this property or had retired it then that property would be in first class operating condition. That is how that figure was arrived at and in answer to your question, my answer is yes, we did use the unit of three per cent a year for retirements.

[fol. 350] Prior to the six year period the companies were in more or less good financial condition and they were rehabilitating their property that is shown from their records, not perhaps to the extent that would be shown by the computation we made but they were keeping up their property prior to that.

The six year period goes back before the war.

I am talking generally, I would not say of my own knowledge that the Belt Line Corporation was setting aside three per cent. I would not say that without looking it up.

Both deferred retirement and deferred maintenance are combined with reference to track and structures. The recognized standard in street railway practice is if a track is in what is known as sixty per cent condition which would make easy safe riding and the entire roadway is in good condition for the public, that it is not in need of immediate attention. In other words it is not included in the recommendations for the appropriations made by the Company for current maintenance for the ensuing year. We assume that track in between fifty and sixty per cent condition was included for current maintenance; between forty and fifty per cent condition was track that required deferred maintenance, not required, but track that represented deferred maintenance, and below that below thirty-five per cent the track should be replaced.

I would not say we deducted thirty-five per cent for the cost of that track, we set up track in thirty-five per cent condition or less as to be replaced. The replacement entered into the reduction of cost as a replacement. The same method was not followed as to

building for the reason there is no comparison between track and building.

The method used for electrical and mechanical equipment was based on an actual physical inspection, similar to cars, and from [fol. 351] that and details from the field inspection, an estimate was made as to the cost of placing the property in first class operating condition both as to maintenance and replacement. That estimate has been criticized because it is rather low. The reason for that is that it is related largely as it is to substation equipment and power house equipment; an operating company might skimp on its rolling stock, on its track and roadway, but it would be the same thing as a man forgetting that his heart had to beat in order to live, for him to forget in the upkeep of either the power plant or the substations.

We did compute deferred retirements where the equipment as installed was such that it should be replaced. We did not take obsolescence of electrical machinery as a type into account except as to the equipment that I mentioned that we figured should be replaced.

By Mr. Fertig:

As to the original costs figures shown in Exhibit BS on the pages applicable to the Belt Line Corporation we collected all the cost data we could obtain, applied to the original cost of construction, where the cost data was not available, we built it up.

I could not with any particularity state which items I had from the actual original cost information, from books and records and those parts I had to build up without looking up the data. I would say that in this particular case well over fifty per cent of the property was taken from the books of the company, the original records of costs. I am talking of the Third Avenue Company, of course we did not make separate figures for the Belt Line, the figures that applied to the Belt Line were those that applied to the Third Ave-
[fol. 351½] nue. I could not tell you whether we had any figures that applied to the original cost of the Belt Line. I do not know if there are any records of that kind extant.

By Mr. Fertig:

In figuring depreciation every bit of track was inspected. I would not say foot by foot. All crossings where there was special work, each crossing was inspected and portions where the man in charge of the district felt should be examined foot by foot was examined. A considerable part was gone over in an automobile.

My recommendation as to value was to deduct from the original cost, the cost of placing the property in first class operating condition. This deduction should combine the two elements, the one being to correct for deferred maintenance the second, for deferred replacements.

By Mr. Fertig:

I do not believe in the reproduction cost method for in accepting that principle you are applying a theory which would not obtain in

practice. If you were to reproduce the property you would not reproduce the property as it exists but you would spend the money to the best advantage taking full advantage of all the advance in the art since the date of original construction and in addition, it is a fluctuating value; your values of today may be very different from your values six months from now.

By Mr. Kingsbury:

There is another method of computing depreciation besides the straight line method and the method of allowances for deferred maintenance and deferred replacement that is the sinking fund method, this approximates the straight line method, the only difference is that it is not applied evenly during the life of the property, there [fol. 352] is very little in the first year and it accumulates during the life. One of the criticisms of the straight line method is that it charges too much in the early years and not enough in the later years.

By Mr. Kingsbury:

I have a general idea of what a rate case is. I have not testified as a valuation engineer in a rate case. Not to my knowledge have I given an opinion as a valuation engineer which has been used as a basis for rate making.

By Mr. Fertig: *R. X Q. 619.*

I would like to move to strike out of the record all the testimony put in by Mr. Madden to the reproduction cost of the Belt Line property as of June 30, 1921 which I believe was $2,859,754 exclusive of land, which was put in at $531,000, on the ground that these figures contain, as was admitted by the witness, a great deal of property not used in the operation of the 59th Street Line and is beyond the issues of this case. The question is the amount of capital used and useful in operating the 59th Street Line and these figures go way beyond it and as he has said, there is no way from the exhibits they have put in of segregating those items.

The Master: I am not inclined to strike out his testimony. Of course, you can make any argument you please.

Motion denied and exception granted.

Adjourned to January 2nd, at 10.30 o'clock a. m.

[fol. 353] New York, January 2nd, 1923—10.30 o'clock a. m.

Present: The Master; Mr. Scoville, for Plaintiff; Mr. Kingsbury and Mr. Stover, for Transit Commission; Mr. Fertig, for District Attorney.

Mr. Fertig: I will ask that the company produce Mr. Ruland to testify on his valuation with reference to the car barn at 54th Street

and Tenth Avenue. Your Honor will recall that Mr. Madden was unable to give the details. As a matter of fact, he said he had not been there in five years; that that work had been done by others and he named Mr. Ruland among them. Mr. Ruland is the man, and so I will ask for the production of that witness to justify any figures covering the car barn.

The Master: You say you want that witness called? Do not speak of him as a witness yet, because he is not a witness until he is presented. They may call anybody. They may go out in the real estate market now and bring in two experts to testify to the value of that barn. They are not bound to prove the value of the barn by any one witness. That is not, as I understand it the issue that was sent to me. I may be all wrong about it, but I do not suppose they are confined to the testimony of persons who have already acted upon the matter for the Commission. I suppose by entirely independent testimony they can satisfy the Court as to what the value of the barn was at a certain date. Is not all the testimony open to me on that proposition?

Mr. Fertig: Yes, your Honor, but they have attempted to prove values through Mr. Madden and through an exhibit known as BS in [fol. 354] in this case.

The Master: Your objection to it stands perfectly unobstructed by anything as far as I can see. However, you have called upon him to produce Mr. Ruland and counsel on the other side will say what he will do; whether he will produce him or not, or what he thinks about it.

Mr. Scoville: Mr. Davison is ill and I am here on his behalf. I would prefer that that request be referred to him for such action as he deems necessary, at the next hearing. We have some odds and ends to clean up before we close, but Mr. Davison being ill suggested to me that if we could not make any progress in his absence, if the other side had anything to produce, why, we could go ahead and not necessarily delay the proceeding.

Mr. Kingsbury: We have a considerable amount of documentary evidence which I am prepared to put in now, it being understood that it is taken up out of order, and that the plaintiff has not yet closed its case. Therefore, we are not committed to closing ours.

The Master: Certainly.

Statement re Exhibits

Mr. Kingsbury: I offer in evidence the following documents:

Certified copy of Notice of Hearing to be held by the Public Service Commission for the First District on July 6th, 1911, in Case No. 1364, being in the matter of the hearing on motion of the Commission as to rates of fare upon connecting or intersecting lines of street [fol. 355] railroads in the Borough of Manhattan, City of New York.

(Marked Exhibit BT.)

Certified copy of Order of the Public Service Commission for the First District, dated July 11th, 1911, in Case No. 1364.

(Marked Exhibit BU.)

Certified copy of opinion adopted by the Public Service Commission for the First District on December 5th, 1911, in Case No. 1364, and as a part of the same printed instrument, but as a separate exhibit, Order of the Public Service Commission for the First District, dated December 5th, 1911, in Case No. 1364.

(Opinion marked Exhibit BV.)
(Order marked Exhibit BV-2.)
Order of Public Service Commission for the First District, dated December 12th, 1911, denying application for a rehearing in Case No. 1364.

(Marked Exhibit BW.)

Certified copy of Order of Public Service Commission for the First District, denying application for rehearing, dated December 15th, 1911, also in the Case No. 1364.

(Marked Exhibit BX.)

[fol. 356] Certified copy of Order of Public Service Commission for the First District, dated February 13th, 1912, allowing intervention by Third Avenue Railway Company in Case No. 1364.

(Marked Exhibit BY.)

Certified copy Petition of New York Railways Company to the Public Service Commission, First District, in Case No. 1364, dated October 21st, 1912, praying to be made a party in such case in place of the Receiver of the Metropolitan Street Railway Company and for a rehearing of the case.

(Marked Exhibit BZ.)

Certified copy of Order of Public Service Commission, First District, dated October 22nd, 1912, allowing intervention by New York Railways Company in Case No. 1364.

(Marked Exhibit CA.)

Certified copy Resolution by Public Service Commission, First District, dated October 22nd, 1912, directing a hearing on the Order made in Case No. 1364 on December 5th, 1911.

(Marked Exhibit CB.)

The papers offered from now on will all be in case No. 1364, unless otherwise noted:
Certified copy letter from John Beaver, Secretary and Treasurer of Central Park, North and East River Railroad Company, to the Secretary of Public Service Commission, First District, dated No-

vember 14th, 1912, stating that the Order of October 29th, 1912, is accepted and will be obeyed.

(Marked Exhibit CC.)

[fol. 357] Notification from New York Railways Company to Public Service Commission, First District, dated January 10th, 1913, as to portion of joint rates to which each company will be entitled on Order of October 29th, 1912.

(Marked Exhibit CD.)

Certified copy of Order of Public Service Commission, First District, dated January 21st, 1913, discontinuing further proceedings supplementary to order of December 5th, 1911.

(Marked Exhibit CE.)

Certified copy Memorandum of Public Service Commission, First District, undated, referring to last order.

(Marked Exhibit CF.)

Certified copy Order of Public Service Commission, First District, dated July 30th, 1914, discontinuing certain proceedings.

(Marked Exhibit CG.)

Certified copy Petition of Job E. Hedges, as Receiver of New York Railways Company, dated May 11th, 1920, for an Order authorizing discontinuance of transfers between the lines of the New York Railways Company and the 59th Street crosstown line of the Central Park, North and East River Railroad Company, now belonging to the Belt Line Railway Corporation of the Third Avenue Railway System.

(Marked Exhibit CH.)

Certified copy Order of Public Service Commission, First District, dated May 18th, 1920, directing hearing on last mentioned peti-[fol. 358] tion.

(Marked Exhibit CI.)

Certified copy Order of Public Service Commission, First District, dated May 20th, 1920, directing hearing on application of Belt Line Railway Corporation.

(Marked Exhibit CJ.)

Certified copy Letter from Alfred T. Davison, General Counsel of Belt Line Railway Corporation, dated July 23rd, 1920, requesting a rehearing.

(Marked Exhibit CK.)

Certified copy Application by Winthrop & Stimson, as solicitors for Job E. Hedges, Receiver of New York Railways Company, dated August 28th, 1920, requesting a rehearing.

(Marked Exhibit CL.)

Certified copy of Order of Public Service Commission, First District, dated August 31, 1920, granting rehearing on application of Hedges, as Receiver.

(Marked Exhibit CM.)

(Adjourned to Monday, January 8th, 1923, at 10.30 o'clock a. m.)

[fol. 359] New York, January 8th, 1923—10.30 o'clock a. m.

Present: The Master; Mr. Davison and Mr. Scoville, for Plaintiff; Mr. Kingsbury and Mr. Stover, for Transit Commission; Mr. Fertig, for District Attorney Swann.

Mr. Davison: I offer in evidence Exhibit BR for identification.

(Marked Exhibit B R.)

Mr. Davison: I offer in evidence Report of Belt Line Railway Corporation to Public Service Commission, First District, made April 16, 1915, in Case No. 1606, of the sale of capital stock and bonds, pursuant to the order of the Commission, dated March 19, 1913, and the disposition of those proceeds.

Mr. Kingsbury: I object to that as irrelevant and immaterial.
The Master: Overruled.
Mr. Kingsbury: Exception.

(Marked Exhibit CN.)

Mr. Davison: I offer in evidence report made by the Belt Line Railway Corporation to the Public Service Commission, First District, April 16, 1915, of sale of its capital stock, pursuant to the orders of the Commission and the disposition of the proceeds thereof, in Case No. 1723.

(Same objection; same ruling; exception.)

(Marked Exhibit C O.)

[fol. 360] I offer in evidence Report of Belt Line Railway Corporation to Public Service Commission, First District, sworn to April 16, 1915, in Case No. 1703, of the sale by Belt Line Railway Corporation of the capital stock, pursuant to Order of the Commission and the disposition of the proceeds.

(Same objection; same ruling; exception.)

(Marked Exhibit C P.)

[fol. 360½] WALTER FARRINGTON, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct examination by Mr. Davison:

I have made a statement of rents received by the Belt Line Railway Corporation from the building located on 54th Street and Tenth Avenue. This statement correctly sets forth those rents received for the years ended June 30, 1920, 1921 and 1922.

Mr. Davison: I offer it in evidence.

(Marked Exhibit C Q.)

These amounts are all included in the exhibits to the accuracy of which I have previously testified in this proceeding wherever the receipts or revenues of the Belt Line Railway Corporation are purported to be stated. That is, for those years 1920, 1921 and 1922.

Cross-examination by Mr. Kingsbury:

I cannot tell exactly what part of the building is leased to the Metropolitan Opera Company. I do not know any of the facts as to these individual items—not as to the physical part of the building. All I can testify to is as to the amount actually received.

[fol. 361] ARTHUR R. JOHNSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Davison:

I am employed by the Belt Line Railway Corporation as general foreman of building construction. I am familiar with the property at 54 Street and Tenth Avenue of the Belt Line Railway Corporation, and the uses to which it has been put.

Cross-examination by Mr. Kingsbury:

The Metropolitan Opera Company uses two floors of the main building, that is, the rear section of the main building, which is about 35 by 200, and uses half of the other section, which is about 25 by 200, for the three floors. They use it for storage of scenery.

I do not know the exact date when the Truck Company of America became a tenant. It was about two years ago. They were in there for, I guess, about—oh, probably eight or nine months. I do not know the exact dates they were in there. They occupy the whole third floor for the storage of automobile trucks. It seems there was some trouble, that the floor would not sustain the weight, or something, and they moved out. I do not know when. I have not the exact dates. I do not know any of the details as to the dates when they moved out, for any of these tenants.

I do not know whether there was an increase in the rate of rental in the Metropolitan Opera Company case between June 30, 1920 and June 30, 1921. They took additional space. They took the second and third floor—part of the second and third floor. About 35 by 200, the space is. About two years ago—two or three years ago; I do not recall any exact date.

The Williams Storage Warehouse Company, Inc., became a tenant about two or three years ago, as near as I recall, they were not tenants in the year ended June 30, 1920.

X Q. 20. How do you account for the decreased amount received as shown by the smaller amount for the year ended June 30, 1922, as compared with the amount for the year ended June 30, 1921?

[fol. 362] A. Well, I do not know exactly how to base that, but——

Mr. Davison: If you do not know, Mr. Johnson, do not try to testify to it.

(A. to X Q. 20. continued:) I do not know.

They occupied the third floor when they first went in there, and they moved down to the second when the Truck Company of America took possession.

The ground floor is occupied by the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company, I should say about fifty per cent of the first floor is actually used by the Belt Line Railway Corporation. They use part of the second floor for storage of cars. I do not know as—the Belt Line does not own it; used for the storage of cars.

X Q. 26. You say storage of cars that the Belt Line does not own?

Mr. Davison: Just a moment.

Mr. Kingsbury: I am cross-examining, Mr. Davison.

Mr. Davison: I called this witness, Colonel Kingsbury, to tell you the physical facts of the occupancy of this building.

Mr. Kingsbury: That is what I am trying to get at.

Mr. Davison: I object to this. This witness is not qualified to state in answer to the question you are asking him now. I think inasmuch as I offered him for cross examination to you, did not call him for myself at all, just called him so that you could find out the physical occupation, you ought not to go into these questions that you are now asking.

Mr. Kingsbury: You did not state when you called him for what purpose you called him.

Mr. Davison: If you still insist on asking him these questions, you can do so.

Mr. Kingsbury: If he does not know he can say he does not know.

(X Q. 26 read.)

[fol. 363] The Master: What does he know about the ownership of the cars?

The Witness: I do not know that.

About fifty per cent of the first floor is used by the Belt Line Rail-

way Corporation. I could not say how much of the second. All of the top floor is now unused altogether.

Redirect examination by Mr. Davison:

There are association rooms on the second floor for the employees of the Belt Line Railway Corporation, also offices. I do not know the proportion of the second floor that those rooms and offices occupy. The space they do occupy is about 25 by 100.

The Belt Line Railway Corporation rents cars which it operates. It owns some cars.

R. D. Q. 38. How many?

Mr. Kingsbury: I object to this question on the ground that Mr. Davison has already stated that he did not know.

The Master: I thought you said he did not know anything about this.

Mr. Davison: I am asking if he does know. Colonel Kingsbury has left the record in a very uncertain state.

The Master: Not for me. I do not understand that this witness knows anything about the ownership of cars.

R. D. Q. 93. Do you know anything about the ownership of cars of the Belt Line Railway Corporation?

A. Yes, sir.

The Belt Line owns twenty-six cars, of storage battery type. It does not operate those storage battery cars now. It rents the cars it operates. I do not know where those storage battery cars are stored. From time to time the cars operated by the Belt Line Railway Corporation are stored on the second floor.

R. D. Q. 46. In other words, there are times when more cars are in operation than other times, are there not?

A. Well, they do not store them on the second floor. It is dead storage. The second floor is all dead storage.

[fol. 364] R. D. Q. 47. But there are cars stored on the second floor which the Belt Line Railway Corporation does from time to time operate.

By the Master:

Q. 48. Is that so, or is it not so, or do you not know?

A. I do not think so.

By Mr. Davison:

I do not know why the Truck Company of America moved out. I know they did move out. When they came in, Williams Storage Warehouse ceased to use the part of the building which the Truck Company of America used and then when they moved out, the Williams Storage Warehouse took that part again.

Recross-examination by Mr. Kingsbury:

I do not know, without counting them, how many trolley cars are stored on the second floor, as of the present time. There are twenty or thirty. They are trolley cars, electric trolley cars. There are some storage battery cars. I have seen these cars myself. The cars which the Belt Line Railway Corporation owns have on them the words "Third Avenue Railway System." The cars which bear the words "Third Avenue Railway System" also usually bear words indicating the particular line on which they are operated.

When I mentioned automobiles stored on this floor I meant passenger automo' iles, not cars for operation on tracks.

The cars for operation on tracks, stored on the second floor, in addition to the words "Third Avenue Railway System," have signs which denote the routes they go on. They have these Hunter signs, what they call Hunter signs.

By Mr. Davison

A Hunter sign is an illuminated front deck sign which shows probably all the routes of the whole system where they can take that car from one route to the other and switch them around. By "route" I mean the streets on which its runs or the destination to which it runs. They are on a roll that you wind up or unwind. They pass over some lights which are illuminated.

[fol. 365] R. X Q. 73. Are the names of the companies that you said——

A. No, sir.

The Master He did not say names of any companies at all.

Mr. Kingsbury: I would appreciate it, judge, if I might conclude my cross examination without interruption.

The master: Yes.

Mr. Davison: I thought I might be able to bring it out quicker.

Mr. Kingsbury: And I would also appreciate it if you would let the witness testify rather than put the words in his mouth.

R. X Q. 74. Still continuing about these cars and the names and omitting reference to these Hunter signs, as you have described them, have the cars no words on them than "Third Avenue Railway System?"

A. Oh, yes, the names on them.

R. X Q. 75. On the bodies of the cars?

A. Yes, on the deck.

R. X Q. 76. I mean, outside of the so-called Hunter signs, have they anything else painted on them?

A. Not that I know of.

R. X Q. 77. Are you sure about that?

A. Quite sure.

R. X Q. 78. And this Hunter sign you say is adjustable?

A. There are also Bloch signs.

R. X Q. 79. What are Bloch signs?

A. There are Bloch signs on the top, which has a four sides, and

if they go on one route, why they turn that around, and if they go on another route, they turn it around to the route which is designated on that.

R. X Q. 80. And that hangs over the platform?

A. Yes.

By Mr. Davison:

R. D. Q. 81. None of these signs indicate any corporation in the Third Avenue system?

The Master: He has told that.

Cross-examination by Mr. Fertig:

I really do not know how many tracks there are on the ground [fol. 366] floor without counting them. I could not say how many are occupied by the Belt Line either. They can put them on any track, use any track. I did not know that the tracks along the southerly end of the building are devoted to the Belt Line. I have been fifteen years with the Third Avenue. It is not a fact that when there are several lines operating that use a common building for storing cars, that so far as possible the cars belonging to any particular line are segregated from the rest along certain tracks—not that I know of. I have seen them all over the floor. I do not know whether in this case that is so or not. I designated about fifty per cent as the part of the ground floor that was used by the Belt Line.

R. X Q. 89. How could you do that, not knowing what tracks were used by the Belt Line?

A. Well, by the number of cars that I see there. I believe there is room for about 114 cars there, and the Belt Line had, I believe, about 60, something like that, 55.

R. X Q. 90. You say you believe they had "about." You are attempting to apportion the use on the basis of fact. Now, do you know?

A. No, sir.

[fol. 367] Irving Ruland, called as a witness on behalf of the plaintiff, being first duly sworn, testifies as follows:

Mr. Davison: Mr. Ruland is called for the reason that Mr. Fertig requested it.

Mr. Fertig: You are calling him now at my request, then?

The Master: He is producing the witness at your request for such examination or cross-examination as you care to make. You better identify him as to the position he holds.

Direct examination by Mr. Davison:

I am in the real estate business. I have been in the business of buying and selling real property in the Borough of Manhattan since

1889. I am familiar with the prices of real estate and the value of real estate. I made an appraisal of the land at Tenth avenue and 54th street, on which the building of the Belt Line Railway Corporation is erected, at the request of somebody in the New York State Transit Commission. I do not think it was Mr. Madden. I made a report of that appraisal to the Transit Commission.

Mr. Davison: Do you concede his qualifications, Mr. Fertig?

Mr. Fertig: Yes, I concede them for the purpose of this examination.

Mr. Davison: And you, Colonel Kingsbury?

Mr. Kingsbury: I concede them for the purposes of a real estate expert.

[fol. 368] This property is situated on the westerly broadfront of Tenth avenue, 53d and 54th streets; 200 feet and 10 inches on Tenth avenue; 475 on 54th street; 475 on 53d street, and 200 feet and 10 inches in the rear.

The date of my appraisal for the Transit Commission was June 30, 1921, and January 1, 1922. I do not think the relative value of the land to-day as compared to that time has changed. It is the same. In my opinion, the value of that land, exclusive of building, to-day is $531,000. That is the amount I reported to the Transit Commission.

Cross-examination by Mr. Fertig:

I was asked by the Transit Commission to report on the value of the building, the car barn on 54th street, covering the land I have just described. I made this report in this form: I said that the building——

Mr. Davison: I object to what the witness reported to the Transit Commission. I have called this witness to state the value to-day of that property and I have only asked him the value of the land.

(Argument; objection sustained.)

Q. 15. Did you make a report to the Transit Commission covering the land and building on the car barn site?

A. I made a report covering that.

Mr. Davison: I object to that.

The Master: Ask him did he make a report?

Mr. Fertig: I asked him that.

The Master: But you are asking him what the contents of the report are. Maybe he did not make any.

[fol. 369] By the Master:

Q. 16. Did you make any report to the Transit Commission?

A. I did.

By Mr. Fertig:

X Q. 17. What was it about?

Mr. Davison: I object to that.

The Master: The report, I presume, is in existence and can speak for itself, can it not?

Mr. Kingsbury: It is not a public document. It is in the confidential files, as I understand, of the Transit Commission. It is not part of their public records.

The Master: If they do not want to put it in, they need not.

Mr. Fertig: If your Honor please, Exhibit BS is in the record, and that purports to show the value of the various items and property.

The Master: Does it value this particular building?

Mr. Fertig: Yes, your Honor, it sets forth a value for the building. Those valuations are the valuation compiled by the Transit Commission on the basis of reports made to them by Mr. Madden and his subordinates. The witness was one of them who functioned under Mr. Madden. That figure is in the record. I am trying to find out how that figure came about. This witness is the one that supplied the figure.

Mr. Davison: Hold on, that is just the point. Is this witness the one who supplied the figure?

X Q. 18. Did you supply that?

Mr. Davison: I object. Mr. Madden is the person to say who supplied that figure for the value of the building and Mr. Madden is [fol. 370] right here. You can ask him. This witness cannot say what was in the report made by Mr. Madden.

The Master: No, he cannot from his recollection undertake to say what is in the written report that is in existence.

By Mr. Fertig:

X Q. 19. Were you employed by the Transit Commission to make a valuation of the land and building?

The Master: He was asked by them. Or do you mean by "employed" did they pay him any money for making the report: is that it?

A. They did not, if you want to know the truth, so far.

X Q. 20. Were you requested by the Transit Commission——

The Master: He said he was requested, he was asked.

A. Yes.

X Q. 21. Did you make a valuation of the land?

A. I did.

X Q. 22. Did you make a valuation of the building?

A. I did not.

Cross-examination by Mr. Kingsbury:

I have examined this property very carefully. I did not examine the building for the purpose of making a valuation of it, for the reason that I said to the Transit Commission in my report, it is a building designed and——

The Master: Never mind going into those details. You did not. That is sufficient. Now, Mr. Witness, just please answer the ques- [fol. 371] tion simply without running into details beyond them.

Mr. Davison: I do not know that the witness has qualified himself to testify as to the value of buildings. I object to any testimony by the witness as to that.

The Master: I will sustain the objection.

X Q. 26. Are you sufficiently familiar with the building upon that property to be able to express an opinion as to its value?

A. No, sir.

X Q. 28. In your opinion, is the land worth more with the present building on it than it would be worth if it were vacant?

Mr. Davison: Objected to as irrelevant, incompetent and immaterial.

The Master: No, that goes direct to the value of the land. I will allow that and give you an exception.

A. For general commercial purposes, yes.

X Q. 29. Can you give any idea as to approximately how much more it is worth with the building on it?

Mr. Davison: I object to this question on the ground he has stated he is not qualified or cannot state the value of the building.

The Master: Yes, I will sustain the objection.

Mr. Kingsbury: If your Honor please, he testified that he was not prepared to express an opinion as to the value of the building by itself. Now, he says he thinks the land is worth more with the building on than it would be with the building off. I only asked him if he could give any approximate idea of how much difference it makes.

The Master: I do not think from his statements that he is qualified to give an opinion about the value of the building, anyhow, the [fol. 372] value of this particular building.

By Mr. Kingsbury:

I placed the unit value of a 25 by 100 lot inside of Tenth avenue at $17,000, and the unit value of a 25 by 100 inside lot on 54th street and 53d street at $11,000. Now, on 53d street there are 15 lots and on 54th street there are 15 lots. That together with plottage, is equivalent to 33 lots, which multiplied by 11, gives $363,000 for the value of the street frontages, exclusive of the Tenth avenue frontage. The Tenth avenue frontage has eight lots, and giving 50% for each of the corners, is equivalent to 9 lots, which with plot-

tage, makes 9.9 lots times the unit of value $17,000 makes $168,300. These two figures added together make $531,300.

These unit prices for lots are based upon vacant lots. So that my value represents my opinion of the value of the property as vacant and unencumbered land.

I am familiar with the general character of the neighborhood there.

X Q. 35. And do you consider the building now upon the property an appropriate improvement for the property, taking into consideration the character of the neighborhood?

Mr. Davison: Objected to.

(Objection sustained; exception.)

In this estimate I added ten per cent. for plottage. Plottage is added value that a unit—the ordinary unit, 25 by 100 feet, acquires by being added to other units of the same size—adjoining, ad- [fol. 373] jacent property—for the reason that the improvements on a big plot can be administered more profitably in proportion to the expense.

I reached my unit prices for these different lots by a survey of the neighborhood and a general study of the relation of this plot east, plot west, north and south, and a survey of the prices that have been received for leases and rents to be obtained.

There is not a very great deal of vacant property in the neighborhood.

There was not any substantial number of sales of vacant property in that neighborhood, from which I reached my conclusions as to the value of individual lots. The only sale that could be considered as of vacant land was immediately opposite on the southwesterly corner, 54th street and Tenth avenue. There was a plot 100 by 125 sold last year or year before last, which has subsequently been improved and resold. Most of the other sales were of tenements and old factories, and so forth.

As to my processes of computation and use of that material in reaching my conclusion as to the value of the individual vacant lots —well, for instance, in the sale of a tenement house in the neighborhood, which is sold for a certain amount, I ascertain an approximate amount of the rental of that property, give the building a certain value as indicated by the rentals, and deduct that value from the sale price, and that gives the value of the land. That is one process. Certain sales of vacant land are used as a check-up. The corner that I spoke of, the only sale of vacant land that I recall at the [fol. 374] moment. There are others, I think. That is 808 Tenth avenue, southeasterly corner of 54th street, 100 feet 5 inches on Tenth avenue, by 175 feet on 54th street. It was sold in April, 1919, executors' sale for $130,000. Its assessed value at that time was $96,500. That made the unit price $15,750, taking the whole plot as facing on Tenth avenue, disregarding the fact that three of the lots are on 54th street and four of the lots are on Tenth avenue, regarding all as of equal value, the unit value for the entire plot

of $15,750. Of course, the Tenth avenue lots are of more value than the lots on 54th street.

I gave the unit of value the Belt Line property on Tenth avenue for an inside lot as $17,000. This would analyze to about the same, and taking a value of the three lots on 54th street at the lesser value which they have than the value on Tenth avenue, it would be about that figure.

I do not think that the general course of property values in this neighborhood has changed very much. It has rather gone up than down, I should say, generally speaking.

The nature of the improvements in that immediate neighborhood is very mixed. On 54th street opposite the barn, there is a church, a big factory, a few tenement houses. On 53d street it is nearly all tenements; generally speaking, it is a tenement neighborhood. But it is also mixed on some streets with factories, and so forth.

[fol. 375] Redirect examination by Mr. Davison:

I do not know exactly how far north the land of the freight division of the New York Central Railroad Company goes. The tracks are on Eleventh avenue. Well, I will tell you exactly (referring to paper). This property is about 225 feet east of Eleventh avenue. The end of this property is about 225 feet east of Eleventh avenue. I do not know exactly how far away the freight terminal is, Sixtieth street? I did not know you were referring to that one. There is a freight terminal at Sixtieth street and Eleventh avenue—six blocks distant, that is all—only six blocks haul to a freight terminal.

Mr. Kingsbury: If your Honor please, I move to strike out all of the testimony of this witness, upon the ground that it has no bearing whatever upon the issues in the case and is incompetent, irrelevant and immaterial. The property actually referred to in this case is property improved with a building used in small part for railroad purposes, and this witness' testimony goes entirely to the value of the land upon which the building stands if it were vacant land.

The Master: Motion denied.

Mr. Kingsbury: Exception.

[fol. 376] John H. Madden recalled.

Recross-examination by Mr. Fertig:

The quantities given under the original cost basis and the reproduction cost basis are the same in each case. The prices for 1921 would be the prices of the various items of physical property entering into the car barn at 54th Street and Tenth Ave., at the average price from January to June, 1921. The 1910 to 1914 figure was gotten using the average prices 1910 to 1914.

R. X Q. 625. Did Mr. Ruland or anyone else report to you about the value of the building?

Mr. Davison: Objected to as incompetent, irrelevant and immaterial.

The Master: I do not know what he is leading up to, I will allow it.

Mr. Davison: Mr. Ruland has testified that he did not know about the value of the building.

The Master: I will allow this particular question.

Mr. Davison: It calls for an answer yes or no, does it not?

The Master: The answer is simply yes or no.

R. X Q. 625 (*22ad.*).

A. Your Honor, I cannot answer that without a qualification to be strictly truthful.

By the Master:

Q. 626. What is the qualification?

A. The qualification is that——

Mr. Davison: I do not want what Mr. Ruland said in this qualification. I do not want to state what Mr. Ruland said.

A. to Q. 626 continued: I understand that perfectly.

[fol. 377] Mr. Davison: The qualification is that the report contained a comment. Mr. Ruland's report contained a comment with reference to this building, but he did not place a value on it.

By Mr. Fertig:

R. X Q. 627. Did you use his comment in fixing your value?

A. I did not.

By Mr. Kingsbury:

R. X Q. 628. Have you Mr. Ruland's report with your?

A. I have.

R. X Q. 629. Will you produce it?

Mr. Davison: I object.

The Master: I thought this was the report that was said to be confidential on the files of the Commission, and I ruled out his testimony because the report was not here. Do I understand that report is now produced here?

Mr. Fertig: Yes, they have a right to produce it.

The Master: Yes, but I thought it was confidential and they did not want it in.

Mr. Kingsbury: Mr. Madden just explained to me that it is not a confidential report. I understood it was.

The Master: Oh, well, of course. If you have the original report I suppose it is competent.

Mr. Davison: Containing Mr. Ruland's comment? Mr. Ruland said he did not consider himself qualified to value the building.

The Master: Therefore, I would pay no attention to his comment

when I see it, but the report is a legitimate piece of testimony be- [fol. 378] cause it is one of the foundations on which Txhibit BS is built.

Witness produces report.
(Marked Exhibit CR.)

By Mr. Kingsbury:

In the estimate we made we valued the entire building, we placed a value on the entire building and did not limit our valuation to that part actually used for railroad purposes.

By Mr. Fertig:

R. X Q. 633. Mr. Madden, I want to ask this question for the purpose of clearing up the record; you will recall, when you were on the stand last, I asked you some questions as to Exhibit BS in this respect: I asked you whether the figures set forth for the respective items of property under the Belt Line Railway Corporation were applicable to the property used in the 59th St. line service or other property in addition to it. Your answer then was that it covered more than the property in operation on 59th Street Line. Am I right?

A. That is my recollection.

R. X Q. 634. As I reread the record, my question was confined to the reproduction cost figures. Would your reply be the same with reference to the original cost figures and the 1910 to 1914 figures?

A. It would.

Redirect examination by Mr. Davison:

When I gave the value for shops and car houses as $275,812 I meant the building at 54th St. and Tenth Avenue, the value on the original cost basis; and the valuation given as $759,756 was of June 30, 1921 as of the same building—We figured depreciation [fol. 379] on the straight line basis also an estimate of the amount of money that would be required to place the building in good repair. I gave the depreciation value as of the 1921 basis as $436,-756 conforming to the previous report these are subject to some revision. The amount required to place the building in good repair is $10,000. The figures I testified to at the first hearing were revisions of the printed report. I also testified that there would be some further revision amounting to about $70,000.

There would be no material revision in the amounts I have given for the building.

Recross-examination by Mr. Fertig:

In the estimate of depreciation on a straight line basis the general practice was followed, a life placed on each item of property and the value depreciated on the expired life—if a building was given 50 year life and has been in use 25 years the depreciation would

be 50%. I do not know how long this building has been in use without referring to the records. I think there was no revision of the life assigned. In my opinion the best test of depreciation is to take account of the actual physical condition of the building as it exists.

There was an examination made of the building for the purpose of recording its——

The Master:

Q. 643. Physical condition, I suppose.

A. Its physical condition.

By Mr. Fertig:

I could not tell you who did that without looking it up. It was one of the staff that was engaged in that work in the field.

[fol. 379½] R. X Q. 645. The figure that you assigned for depreciation on that building was $10,000. was it?

A. No, the figure we assigned for the estimated expenditures to put the building in good condition was $10,000. That was our recommendation as the base to be employed in computing depreciation.

I did not assume that the building was out of date for the purpose for which it is now being used so I did not take into account obsolescense.

If I were going to construct a car barn I would not construct a building of that character. I think there would be some material changes made in the design and type. I did not take into consideration with reference to obsolescence in connection with depreciation that the entire top floor was idle, if it was idle at the time. Our valuation was on physical property, nor did I take into account the possible occupancy.

My figure would be the value for a specific purpose.

By Mr. Davison:

By my figure I mean the figures contained in Exhibit BS and that were referred to in the testimony.

[fol. 380] Charles E. Hall, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct examination by Mr. Davison:

I gave to Mr. Madden, the chief of the Bureau of Valuation of the Transit Commission, a statement of property belonging to the Belt Line Railway Corporation. This statement which you show me is a copy of that statement.

Mr. Davison: I offer it in evidence.

Mr. Kingsbury: Subject to the same objections as heretofore.
The Master: Yes.

(Marked Exhibit CS.)

Cross-examination by Mr. Kingsbury:

This exhibit is in miles or decimals of a mile. The words "Tax Report Year Ending December 31, 1921" at the beginning of this statement mean that this is the mileage statement that accompanied that tax report. These statements of miles are direct measurements. This statement accompanied the tax report. It is a statement of the miles of track owned by the Belt Line. We made actual physical measurements. We embodied these measurements in a tax report and went to our original sources to make up this statement.

[fol. 381] M. T. Ryder, recalled as a witness on behalf of the plaintiff, being previously sworn, further testifies as follows:

Direct examination by Mr. Davison:

I am employed by the Belt Line Railway Corporation as way engineer. I am also the Way Engineer for all the companies comprising the Third Avenue System—some ten or twelve operating companies, in the City of New York, including the Boroughs of Manhattan, Bronx, and also Westchester County. I have had that position for Manhattan since 1908; for the Bronx and Westchester since 1910.

I am a civil engineer, and a graduate of Sheffield Scientific School, Yale University. Received a B. S. degree in 1896, and a degree of C. E. in 1898. Since that time I have practiced the profession of engineering, except for one year, when I was instructor in Yale University. In that period I have familiarized myself with the details of construction of street car tracks in the Borough of Manhattan. I know the cost of construction as well as the value of property already constructed. I have made an estimate of the cost to reproduce as of the present time the track and structures, not including the duct lines, on 59th Street of the Belt Line Railway Corporation between First and Tenth Avenues and on Tenth Avenue from 59th Street to 54th Street.

Cross-examination by Mr. Fertig:

My experience in constructing street railroads in the City of New York has been: The Fort George Extension on Amsterdam Avenue; the Third Avenue Bridge Company extension on 60th Street from [fol. 382] Third Avenue and the Queensborough Bridge; and a few other short—mostly connections of the underground electric type. Of the overhead trolley type there have been a very large number. The Fort George extension runs from 187th Street to

about 196th Street, about nine blocks. I was the engineer in charge; drew the plans, and saw that the work was done. That was built during the receivership. The receiver undoubtedly signed the contract. My work was confined to the engineering phase of the job, planning it and seeing that it was executed. In designing it I had to pay attention to cost—simply the usual degree of designing it as cheaply as possible in order to have it satisfactory. That is to say, as an engineer, I know what is the relative cost, generally speaking, of various types of construction, and I designed that as economically as I could.

X Q. 56. But as for specific costs of the items that went into the construction, you were not concerned with them?

A. Yes, certainly.

That job took about three months. I think I did not make a preliminary estimate as to what the job would cost. I think that was made just before I came with the Third Avenue as the job was going on I did not do any figuring as to what it would cost, not during the progress of the work. I did it when it was finished. I looked over all the figures when it was finished for the purpose of determining what the cost was. All the figures came through my office, all the bills. I do not know whether I signed the final statement or the chief engineer, but it all went through my office, as a matter of office routine.

[fol. 383] The Third Avenue Bridge Company connected the tracks on Third Avenue with the Queensborough bridge. That distance was about a block and a half.

Except a few short connections, that is all that has been built in New York City. There is one other that I omitted to state—the electrification of Canal Street from Centre Street to the Manhattan Bridge. That is underground—about a third of a mile. I planned that and supervised the execution. I made a preliminary report on costs.

I have never made any valuation for rate-making purposes. I have never made any appraisal of any street railway property for valuation purposes.

I have made the valuations for all the tax reports of the Third Avenue system. In those cases I did not take them from the records of the company; there were no records of the company. I determined those figures by my best judgment from all the information I had, knowledge of the subject, using my prior experience and knowledge of the art.

Mr. Fertig: I move to strike out the witness's testimony on the ground that he is not qualified sufficiently to give any weight to the value of the reproduction of property such as the kind he is about to testify with regard to the 59th Street Line; that his experience has not been sufficiently extensive to qualify him as an expert, particularly for rate-making purposes.

(Motion denied; exception.)

[fol. 384] Redirect examination by Mr. Davison:

The track construction, exclusive of ducts, on 59th Street between First and Tenth Avenues and on Tenth Avenue from 59th to 54th Street consists of the underground electric type of construction where the power is supplied from conductor rails beneath the surface of the pavement in the manner usually used in New York City and Borough of Manhattan. It consists of the Tracks and foundations, the entire structure of that type. It consists of tram rails carried on cast iron yokes spaced five feet on centers, with slot rails carried on the same yokes, insulators suspended from the slot rails, conductor rails supported by the insulators, the conduit being formed of concrete and the yokes being incased and founded on concrete, the structure being paved with one or more of the usual types of pavement on a concrete foundation.

R. D. Q. 83. What, in your opinion, is the cost to reproduce at the persent time the track structure exclusive of ducts on 59th Street from First to Tenth Avenues and on Tenth Avenue from 59th to 54th Street?

Mr. Kingsbury: I object on the ground that the witness is not shown to be qualified to testify in answer to that question.

(Objection overruled; exception.)

A. $1,124,000.

I have figured what, in my opinion, is the depreciation on that property due to its use and existence.

[fol. 385] R. D. Q. 85. What, in your opinion, is the amount in dollars and cents of such depreciation on that property?

Mr. Kingsbury: Same objection applies to this line of examination.

Mr. Fertig: Same objection.

The Master: Same ruling.

A. $266,000.

Leaving a net value of $858,000.

I have kept myself informed of the prices of the various materials and cost of labor going into the construction of this kind of track work, for the period since 1908. I have also gone to other sources than my own personal experience to know the cost of such material and labor prior to 1908. I have made an estimate of what, in my opinion, would be the normal trend of prices in the next ten years.

Recross-examination by Mr. Kingsbury:

In making my estimate of reproduction value I estimated upon the basis of reproduction of the present structure. If, as an engineer, I were supervising the construction of a new line of underground trolley in this same locality, it would be very similar except in small details. There has been comparatively little change in the art. So far as there has been any change, it would be in the direction of greater expense as far as the steel rails are concerned, because they

are using heavier rails now than formerly. So far as the rest of [fol. 386] the structure is concerned, there would be very little change.

I reached the figures which I have given for depreciation, by analyzing the cost of construction in different items and assigning a probable life of some of those items and in other cases, considering the actual depreciation that could be observed physically and combining those groups. That is, to certain classes of the construction, I applied the straight line system of depreciation; to others I estimated the expense of making good existing wear and tear, but in the case of the foundation I had a physical inspection made. I was also familiar with it personally and recorded the present condition of the structure as far as it could be ascetained and then used a figure based on that. The straight line method was applied to the tram rails, the slot rails, the conductor rails; that was all. The foundation was treated as a result of inspection. The special work was treatd as a result of inspection. To the tram rails I allowed a life of 20 years; to the slot rails a life of 40 years; to the conductor rails about 15 years; that is 7% depreciation. Those allowances of estimated life are based entirely on observation and experience—my own personal experience. One-third of the total allowed for depreciation represented an estimate on the straight line basis in dollars and cents. The rest was based on actual present condition as I observed it. I should say, to make it perfectly clear, that removal of obstructions—it was, of course, assumed that no depreciation occurred on that at all. By "removal of obstruction" I mean getting the pipes, and so forth out of the way of our structure in [fol. 387] the street. Once out of the way that is done.

Recross-examination by Mr. Fertig:

59th Street was electrified about 25 years ago; and the average of the tram rails now in place there is about six years. That would leave 19 years for the life of the first set of rails. I assigned 25.

I was not familiar with 59th Street twenty years ago. I was here in 1908. I do not think there is much difference in the density of traffic now, compared with 1908.

If I had my choice I would not now lay down the underground system that we have there now; I would put trolley in.

R. X Q. 116. As a matter of fact, do you not think you would run buses along 59th Street?

Mr. Davison: That is objected to as incompetent.

The Master: Objection sustained. That is not before me.

Mr. Fertig: That is a very serious question in the case, your Honor.

The Master: That is not within the text of the commission which I hold sitting here as Special Master. I cannot wander out of the limits of what is sent to me.

Mr. Fertig: Exception.

On the pavement I used the unit price of $6.20 per foot, single track. That is for the pavement. They type of pavement varies. That was an average figure for the whole road. Some of it is granite, some is asphalt.

R. X Q. 120. How did you arrive at the average figure there? How much of it is granite and how much asphalt? Did you check that up?

A. No, I did not make any separate estimate at all.

[fol. 388] The unit cost of granite is higher than the unit cost of asphalt. Asphalt at the present time is about $2.50 a square yard. The only figures I have with me are the figures for the $6.20 that I gave a few moments ago. That is the average figure for the road. The way I got the $6.20 was in applying an increment of 100% to the average pre-war price of $3.10 which I had used in previously valuing this for purposes of taxation. Prices of this pavement today are 100% higher than they were before the war. The $6.20 includes the concrete foundation under the pavement. I made no attempt to average the actual quantities of asphalt and granite. The paving changes from time to time and I have used the figure of $3.10 right along as an average value of pavements in Manhattan streets in our tracks, so that unless I made a special detailed valuation for each piece of track, that is the figure I have been using. I made no special detailed estimate of this piece of track. The $3.10 is a figure that I made up some ten years ago at the time when prices were about the same as pre-war prices, and I do not recall what items went into it.

For steel rails I used a price of $1.75 per foot of single track. That means both rails. I think that is equivalent to about $55. a ton. That was figured out by one of my assistants from the present market price. It is the current price, this year's price. That figure was probably arrived at by calling up the Lorain Steel Company on the telephone, and asking what the current price of the rail is. [fol. 389] For slot rails the price of $1.37 per foot single track was used; probably obtained the same way.

I have no detailed estimate of the yokes. They were included in the foundation price of $16.21 per foot single track. That includes the entire foundation of concrete yokes and building the excavation for it, the entire work of building the foundation for the track. There are no stringers on 59th Street.

My unit on insulators was $3.03 per linear foot single track; that is for the conductor rail system including insulator and conductor rails. I have not the figure for insulators and conductor rails. Excavation is included in the foundation figures I gave you. I have not separated them. I do not think I could separate the figure for excavation. The way that figure is obtained is from the average figure that I have used in making up the tax reports and that is a figure made up to represent average conditions where we do not happen to have any particular knowledge as to the cost of that line, so it is a combination figure.

Clearing obstructions is $19.35 per linear foot of track. That was obtained by using the basic figure of $6. per foot of single track

as the cost of removing obstructions at the time of construction. That was about 25 years ago. To that I added 50% as the best estimate I could make of the probable increase in difficulty of removing obstructions if the work were done at the present time, then I appreciated those cost figures 215% to meet estimated present values. When I say "by reason of the added difficulties" I mean by reason of the added number of gas mains and water pipes and things [fol. 390] that have been put in the streets in the last 25 years. The 215% was obtained by averaging an increase of 230% in labor against an increase of 200% in material. I assume they were fifty-fifty.

My basic figure of $6, as the cost of removing obstructions per unit foot when it was originally constructed, is an opinion figure based on the relative cost of removal of obstructions in a crosstown street as compared with the cost in longitudinal streets throughout the Borough of Manhattan. It is the engineer's estimate. Of course, all estimates have a measure of guess in them. I did not have any record of what was actually there at the time in the way of obstructions. Drainage of conduits is included in the foundation figure.

These figures which I have given are all field costs. There is nothing for general overhead. Engineering is supposed to be in there; that is field engineering.

R. X Q. 159. Are they all included in the individual figures you gave us or have you got a lump sum for them?

A. No, they are all included. That is supposed to be in each item.

When I speak of "bare costs" I include field engineering. The term "bare costs" is used differently I suppose by different people.

Cross-examination by Mr. Kingsbury:

The large appreciation in the cost of labor and materials of the kind involved in this property, of which I have spoken, began about the middle of the war. It reached a peak and then receded. The [fol. 391] figure which I have given there is less than the peak; at the present time. The peak was reached about 1921. There has been a steady decrease in most items since then. I would not attempt to give any figure on how much decrease in percentage there has been from the peak price, not even a very general approximation, because, you see, I made no estimate at peak prices. It is too general to attempt that.

(Adjourned to January 17th, 1923, at 10 o'clock a. m.)

[fol. 392]

New York,
January 17th, 1923—10.30 o'clock a. m.

Present: The Master; Mr. Davison, for plaintiff; Mr. Kingsbury and Mr. Stover, for Transit Commission; Mr. Fertig, for District Attorney Swann.

WALTER J. QUINN, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Davison:

I am the electrical engineer of the Belt Line Railway Corporation and of the other companies comprising the Third Avenue Railway System. I have had that position since 1918. I have been an electrical engineer since 1900. I have had experience in construction of ducts and feeders—underground ducts and feeders. I have been connected with the companies comprising the Third Avenue Railway System in the electrical Department since 1908. From 1908 to 1918 my position was assistant to the chief engineer. As such I had practically the same duties I have now. I have charge of the transmission lines, distribution lines, the power supply, sub-stations, all the electrical work. I am familiar with the costs of installation the value of ducts and feeders.

In my opinion, the cost to reproduce the ducts on 59th Street from First to Tenth Avenue and on Tenth Avenue from 59th Street to 54th Street car barn as of the present is $163,687, and for the feeders $45,421, which makes a total of $209,108.

[fol. 393] I have not allowed in that any overhead. In my opinion, overhead should be included to represent the reproduction costs.

There is no sensible depreciation on these ducts and feeders.

That, in my opinion, is the value today, the cost to reproduce today. In my opinion, $209,108 represents the value today of those ducts and feeders.

Cross-examination by Mr. Kingsbury:

I have no knowledge as to the actual cost of installation of these ducts and feeders. I do not know the original cost. There has been an increase in the cost of that kind of work in the last ten years.

Cross-examination by Mr. Fertig:

There has been about 100 per cent increase as regards the ducts. That is not true as regards the cables. Cables are about 10% more at the present time than pre-war prices. The cost of ducts is about the same as in 1921. It would be a little cheaper now than in 1920. In the prices of ducts there is an increase of about 100% from 1914, or pre-war prices, until now; about 1922 prices. Prices of ducts have not dropped much within the last year. They have dropped about 25% from the high price. That is not a great deal.

X Q. 68. Can you give us a statement showing your computation on the ducts and feeders so that we can check them up and go into details if we find it necessary.

Mr. Fertig: All that the witness has given here is a lump sum and an opinion estimate. If agreeable to the counsel and the Master, I would like to have a statement so — to save a lot of time.

Mr. Davison: Ask the witness if he has it.

[fol. 394] X Q. 69. Have you got such a statement?

A. I have figures showing the cost.

X Q. 70. Will you read the figures into the record?

A. These figures are based on duct foot charges:

Loading and Unloading Ducts $.0059 per duct foot.

Digging trench for duct line $.0395 per duct foot.

Digging manholes $.0068 per duct foot.

Concrete for duct belt $.0107 per duct foot.

Concrete for manholes $.0066 per duct foot.

Laying ducts $.0152.

Forms and lumber $.0041.

Refilling trench $.0105.

Miscellaneous duct wrappings, duct pins, sewer traps, curbs, covers, and other miscellaneous material $.0495.

Municipal inspector $.0122.

Those figures refer to labor.

Material concrete for duct belt $.0374.

Concrete for manholes $.0201.

Ducts $.12.

Forms and lumber $.0052.

Miscellaneous material $.0255.

Paving $.0666.

Miscellaneous to cover field engineering, line checkers, timekeepers, clerical work, storeroom charges, compensation, insurance and so on, $.0067, making a total of $.5116 per duct foot.

By Mr. Davison:

Q. 71. How many duct feet were there?

A. There was 169.083 feet of tile duct and 150.869 feet of cement lined duct. For the cables, there were 19.722 feet of 500,000 circular mile paper and lead cable at a cost of 51 cents a foot, 42.812 of 1,000,000 C. M. paper and lead cable at 82.6 cents a foot.

By Mr. Fertig:

Feeders are the cables which supply the power to the conducting [fol. 395] conductor rails. They consist of copper for the conductor, with paper insulation and a lead sheath over the papers. The bulk of the feeders were installed before we took the property over and some of them have ben installed since 1914. Possibly some of them may be over twenty years old. No doubt they are. There is no depreciation on them.

X Q. 77. The insulation has not suffered any?

A. Yes.

I have examined them. They run from First Avenue to Tenth Avenue on 59th Street; from 66th Street and Second Avenue to Third Avenue and on Third Avenue from 66th Street to 59th Street. They are all underground, encased in the ducts.

X Q. 82. How can you tell the condition of these feeders within the ducts? You did not check those up throughout did you?

A. No.

X Q. 83. How do you know that they have not depreciated?

A. Because, from my knowledge and experience of it.

X Q. 84. How does your experience and knowledge apply to the particular condition of these feeders?

—. Because the cable must be an underground cable, and a lead sheath cable must be in perfect condition all the time otherwise it will fail.

X Q. 85. But it might be in good condition for thirty years and suddenly fail, might it not.

A. No. Not from the nature of the thing.

X Q. —. When would it fail?

A. It would have an indefinite life. I do not know when it would fail if it ever did.

X Q. 87. What has been your experience with reference to feeders and their life?

A. I have never seen any cable that had a life, definite life; an underground feeder.

X Q. 88. They are immortal?

A. I would not say that they are immortal, but sensibly, the life is so long it does not have to be considered. Any defects that occur, [fol. 396] anything that happens will immediately be made good so that you are constantly keeping your cables in perfect condition.

X Q. 89. So then, if anything goes wrong, you may say it has got to be made good. Apparently something does go wrong.

A. Occasionally, yes.

X Q. 90. How does it go wrong.

A. We have a cable punctured and water gets in it and breaks it down.

X Q. 91. Then apparently there is a process of deterioration going on, at least in some places?

The Master: He is talking about a puncture by some outside force. He was telling about the life of a cable undisturbed by outside operation climatic in their nature. A man may drive too far down with a pick and drive a pick into it, something of the kind, or breaking over the arch of the duct.

X Q. 92. Will wou restate what you said last as to the puncture?

The Master: Will you repeat his answer?

(A. to *A*. 90 read.)

X Q. 93. How would it be punctured?

A. It might be from a mechanical injury.

X Q. 94. What do you mean by a mechanical injury.

A. The cables are exposed where they go through the manholes. Men go into the manholes to clean them or they may be excavating along the track and may drive a bull point, a pick, through the duct into the cable.

X Q. 95. Now, one of these mechanical injuries, if you had one, the effect of it would not necessarily be immediate?

[fol. 397] A. Yes, almost immediate; if you shove a bullpoint into it it would be absolutely immediate.

The life of the conducts is indefinite. I do not know that they have any life, any determinable life; made of vitreous material; last as long as rock would, the earth or anything else of which they are made.

I have never discovered any deterioration on the insulation of the feeders; if the cable has not been abused, overloaded or burnt. But in the ordinary use of the cable, I have never determined any deterioration in the insulation. Insulation is made of paper. Paper does not deteriorate when it is in a preserving compound. That preserving compound will last indefinitely.

Overloading would have an effect on the insulation. Overloading is carrying too much current through the cable, beyond its rated capacity. Carrying too much current might carbonize the paper, if it was excessive. That would deteriorate the paper, if it was subjected to such conditions for a long enough time. The overloading does not affect the copper itself. Overloading will not affect the copper, not in the sizes of cables that we are talking of. That is, no overloading that we would get on the cables in actual practice would injure the copper.

A short circuit is only of momentary duration and has practically no affect in the cable. It does not affect the quality of the cable, the copper, at all.

X Q. 112. Does it affect the paper covering either?

The Master: He said in case of overloading, it might carbonize it.

A. If it were of long duration, it might carbonize it, but short-circuits of short duration; they do not injure it.

By Mr. Kingsbury:

These unit prices which I have quoted were taken from actual [fol. 398] jobs that we had recently in the Fall of 1921, none since then. Since 1920, I said, there is a decrease. There is no sensible decrease since the Fall of 1921. The peak of prices in labor and material in work of this kind were in the early part of 1921. There has not been a steady decrease since that time. There has been a slight drop but that drop has ceased. You are to understand that aside from an esternal injury or an overload, there is practically no possibility of deterioration to these ducts or cables. That is the situation. That is what I wish to testify.

[fol. 399] Ely M. T. Ryder, recalled, having been previously sworn, testified further as follows:

Direct examination by Mr. Davison:

At the hearing on January 8th, 1923, I said I had not figured any overhead in my computation of costs to reproduce track and road-

way. In my opinion, overhead is a part of the cost of reproduction. Since that time, I have estimated the amount of overhead which should be included in the cost of reproduction. This overhead which I have figured applies also to the cost of reproduction of the ducts and feeders to which Mr. Quinn has just testified. In my opinion the amount of overhead which should be included in the cost of reproduction of the track and roadway and the ducts and feeders is $280,000.

There is no depreciation on the overhead cost, depreciation does not apply to overhead cost.

I stated at the last hearing that the amount of depreciation was $266,000. I would like to make a correction on that, I omitted to state an item of $5,000 to represent the cost to put in good condition about 400 feet of double track at the east end of 59th Street, which has not been re-railed, connecting with First Avenue, beyond where our cars operate, which would make the total depreciation, $271,000.

I have computed the total cost of reproducing the track and roadway and ducts and feeders as testified to by Mr. Quinn, including the overhead. The total is $1,613,000. Deducting from that depreciation of $271,000 leaves $1,342,000.

[fol. 400] Cross-examination by Mr. Kingsbury:

In my estimate for overhead I include four items: Engineering other than field engineering, interest during construction, cost of financing and administration and legal expenses. The percentages were; engineering other than field engineering, three per cent; interest during construction, three per cent, cost of financing, five per cent; administration and legal expenses, ten per cent; making a total of 21%. I apply the percentage to what we have described as the field cost. I arrived at these percentages more as a matter of knowledge than of experience. They are based on information from hearings, conversation, reading. They are not based on specific experience in particular jobs in which I have actually ascertained the percentages applicable to overhead.

By Mr. Davison:

I have not included any contractor's profit in these figures. If the work were done by a contractor there would have to be a contractor's profit figured—about seven and a half per cent on the field cost.

Cross-examination by Mr. Fertig:

The last time I testified I gave you some experience of my own in construction work: The Fort George extension, 60th Street, and Canal Street. The Fort George construction was about a third of a mile or a half a mile. I have not the figures of the cost of that job. I could not tell what the percentage of the legal expenses of that [fol. 401] job was. I cannot tell what was the legal expense in connection with any of the items of construction that I was on. I could

not give you the percentages for engineering, the cost of financing and interest on construction of any of these jobs; I have never computed them.

In this particular case, $133,000 is the amount for both legal expenses and administration together, including both track and ducts. I am unable to separate the amount for legal work. I got the ten per cent from knowledge of reports of costs in similar cases. The most pertinent instance I can give you is the testimony which I heard the chief engineer who built all these underground lines here, which happened to be that same percentage—the testimony he gave on the occasion of an action between the Ninth Avenue Railroad Company and the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company, a year ago, in the Supreme Court, New York County. I do not think he stated whether he was testifying there on the basis of an estimate or as to actual experience.

The three per cent for interest is an assumed charge of six per cent for six months.

I have never financed a construction of this kind myself. My figure for cost of financing is the figure that corresponds to the testimony given in other cases before commissions and courts. The figure varies widely. It actually is very much more than that.

By the Master:

The estimate for interest covers really what you take to be the interest on a certain sum of money that is necessary to have from [fol. 402] time to time when the work is going on, until it can be put into service. The financing is a discount for underwriting the securities.

By Mr. Davison:

Discount is practically the commission that the brokerage house would charge for underwriting. Of course, there is a good deal of doubt whether it could be underwritten at all, but I am assuming that it is a going concern and it would be underwritten, if at all, at that rate.

By Mr. Fertig:

I do not know of any company of good credit paying six per cent on its bonds that would pay 5% discount at the present time. I should think that the amount of discount, among other things, would depend upon the rate of interest paid upon the bonds.

No, I am not assuming that if I reproduced this road I would be reproducing an unprofitable thing. I stated there was some doubt whether at the present time such a project could be underwritten, but that if it was assumed to be a going concern, it would probably just be underwritten for that amount. I think it could not be underwritten because the credit for street railway business has been very poor for the past few years. I am assuming that the credit of

this particular operation is good enough, that they could get the money at five per cent.

X Q. 222. As a matter of fact, upon the cost of reproducing the plant as it now stands, do you suppose you could get any money to construct such a road?

Mr. Davison: I think I will object to that as irrelevant and incompetent and immaterial.

Mr. Fertig: Perfectly proper, I want to show that the cost of reproduction would be so outrageously high that you could not get [fol. 403] any money on credit, the whole thing would fall of its own weight.

Mr. Davison: The witness assumes he is going to reproduce the property.

Mr. Fertig: He is also assuming a certain cost of financing and the cost of financing depends upon these various items. It seems to me I have a right to go into it.

The Master: Why is this witness qualified? He is not a financier. He does not know whether he can go out in Wall Street or any where else and get money for it. I think I will sustain the objection on the ground that the witness is not qualified.

Mr. Fertig: If that be so, I move to strike out all his testimony as to the cost of financing.

The Master: I will entertain your motion and dispose of it when I dispose of the whole case.

Mr. Fertig: I take an exception to your Honor's ruling.

Mr. Kingsbury: I also make such motion. I move to strike out the entire testimony of the witness on the ground that it appears by this cross-examination to be based on hearsay and conjecture rather than upon knowledge.

The Master: I make the same disposition of that, as I will of the other. I will rule upon that when I come to the close of the case. You may have an exception.

By Mr. Fertig:

Last time, I testified to a unit cost of $19.35 per linear foot for clearing obstruction. A great deal of the cost of clearing obstruction occurs at street crossings—whether the greater part of it does [fol. 404] depends entirely on circumstances. Whether the cost of removing obstructions is higher at crossings of places like Fifth Avenue, Broadway and Madison Avenue along the 59th Street line than it is between the crossings depends entirely upon whether they are longitudinal obstructions between intersections where the road is to be built. In that case, the cost between intersections would be greater. It is entirely a matter of what you find in the street. If pipe lines were run east and west on 59th Street, and happened to be within the area where the track was to be built, that would make the cost between intersections greater than at intersection. It would be impossible to predict in advance what it would be.

My figure of $19.35 per linear foot was not based on any line or lines. It is a general opinion figure. I have checked up as to some pre-war cost on the lines that I have given you. Canal Street came out a little below six dollars a foot. 60th Street came out, I think seven dollars and something a foot. Of course, there is no certainty that these lines are directly comparable.

Last time, I testified that my basis figure of $6 as the cost of removing obstructions per unit foot when it was originally constructed was an opinion figure based on the relative cost of removal of obstruction in crosstown streets as compared with the cost in longitudinal streets throughout the Borough of Manhattan.

X Q. 233. What were the costs in each of the longitudinal streets that you used?

A. It is not based on any figure for any individual streets now.

X Q. 234. What streets did you have in mind, longitudinal streets.

A. The only specific street I had in mind was the figures given I think by Mr. Starrett, the chief engineer at the time the lines were built in Third Avenue. It was a tax case. I would rather not attempt to quote his figures from memory. I could supply them [fol. 405] if you desire them for that particular case. They were given in court.

By the Master:

The difference between the actual cost of removing obstructions in crosstown streets as compared with the cost of longitudinal streets, is not due to greater difficulty in putting labor to work and accomplishing results on a longitudinal street, on account of the amount of travel in the street. It did not have reference to the traffic conditions. It has reference to the fact that the avenues in New York usually contain more pipes and ducts than the ordinary crosstown streets; so that at intersections with the avenues you would find the larger amount of obstructions. The only trouble in taking that theory without modification is, as I stated before, if you happened to strike longitudinal structures on the crosstown street, you may then get a higher cost between intersection. But ordinarily the intersection with the avenues give a larger amount of obstructions.

Q. 235. In other words, if you were moving through a crosstown street, you simply have to meet the obstructions which you find as you get to each north and south street. That is one thing, but if you were hitting an obstruction that runs the full length of the block in the cross street, then of course there is a greater quantity of work to be done, is that what you mean?

A. Yes, sir. I can give a very definite illustration of that. The figure I just quoted was a little over $7. I find I have here the cost of removing obstructions on Sixth Avenue, $7.06 per foot of single [fol. 406] track. I recall that we had to move water pipe the entire length of that street when we came to Second Avenue and tried to find a place to put the duct line through. There were so many

obstructions that the only way we succeeded in doing it was to go down about 12 feet and go under all of them. We gave up the possibility of going through on a level; went down below the whole business.

By Mr. Fertig:

The figures that I relied upon that were used by Mr. Starrett in the tax case were actual figures. They cover quite a variety of lines given by name. 125th Street was one. I think that was over $10 a foot. Amsterdam Avenue was one. That is from 125th Street north. I think that was only $2.70 a foot, but I would rather not attempt to give you those figures exactly. I can produce the figures upon which I relied in making this estimate of $6 a foot. I would not want to say I place my entire reliance upon these figures. I will be glad to give you those figures at a subsequent hearing.

In figuring the cost of removing obstructions per foot, I took into account the fact that on a crosstown street the crossing are not as frequent, that the distances between crossings are much greater than those on a longitudinal line. That is, our average figures, they take account of the intersection and the spaces between intersections, both. I cannot tell you to what extent I took into account the factor of the streets cutting in. My figure was based entirely on a study of such figures as I have seen for removal of obstructions in all the different streets. At my reproduction value of $19.35 per foot of track the total amount for removing obstructions is $346,000.

[fol. 407] I do not know where the gas mains on 59th Street are, I do not know whether the water mains are on the side of the street.

The slotted track construction goes to a depth of about three feet below the surface. That includes the foundation on which it rests. That is the depth of excavation you have to make. The exact depth varies somewhat with the different types of construction. Thirty-six inches is just about the right figures for the greatest depth of either of these constructions on 59th Street. That is probably within two inches of it.

Sewers are rather deep—sixteen or eighteen feet. We have to change the manhole, but not the sewer proper. I might be able to clear up the point about the water and gas mains. It is entirely immaterial how deep they are; if they occur at the proposed location for the tracks, they have to be removed anyway, so as to make them accessible for a later date—necessarily, in every case, so as to make them accessible for repairs later. That practice is followed universally so far as I know. We have had to move them. That is why I know.

I do not know in what year it was that the overhead telephone, telegraph and other electrical wires were placed underground. I do not know whether it was before or after the installation of the slotted track in 59th Street. I am not familiar with the sub-surface as that existed in 59th Street in 1897, the year of the elec-

tricification of this road, nor with the sub-surface work that has been added during the past 25 years.

The basis in fact for my estimate of 50% increase in the difficulty of removing obstructions is common knowledge, that with the growth [fol. 408] of the city, there has been a very great and corresponding growth in the underground structure. That is the best explanation I can give of that figure I used. In my reproduction value I used the prices of today applied to the physical unit reproduced under conditions obtaining in 1897, except that the tram rail has been renewed with a heavier rail and that is taken into consideration.

The value of the clearing obstructions is reduced by the fifty per cent factor, as to the original installation. In my opinion the unit cost of about $7.70 per foot track for removal of construction, used in Exhibit BS is not correct. I cannot explain it.

In regard to depreciation I testified that in the case of foundation I had a physical examination made to determine their condition. The physical examination that can be made at the present time is simply to go into the manholes. Owing to the fact that we have rebuilt all that track within the last, averaging six years, we have had occasion to know the condition of the yokes, the concrete structure, and we have repaired all the defects that were found. Those defects which were found and not repaired, I have allowed for in my figures. Property of this kind cannot be examined now. It would be impossible to examine it. The only places where you can test them is in manholes and at other places where you may happen from time to time to make repairs. There are manholes about every 100 feet. It is impossible to state whether repairs happen at frequent or at infrequent intervals. We made the repair as we went along.

[fol. 409] By Mr. Davison:

Q. 279. But the repair you made, covered the entire line, did it not, on 59th Street?

A. Except for about 400 feet on the east end that I testified to this morning.

Q. 280. So, you could actually see every foot of it?

A. We could see every yoke and the top of the concrete forming the conduit for the entire length.

By Mr. Fertig:

I had a tabulation of the price of granite pavement made for the year 1922, average price. Including foundation it was $7.80 a square yard. The price of $6.20 per foot of track for pavement, to which I testified, was for granite and asphalt combined. That amounts to, roughly $112,000. I have taken the cost per foot by the length in feet. It is practically a yard per foot of single track. That would be 18,000 square yards. I do not know how many square yards of granite block pavement there are on the 59th Street crosstown line, nor how many square yards of asphalt. I could not state the proportion of granite and asphalt.

Cross-examination by Mr. Kingsbury:

I do not know what obstructions actually were removed when the 59th Street line was built.

By the Master:

Q. 290. One question. As to these obstructions at the intersections of streets, does it make any difference in the number or quantity of obstruction that have got to be removed at the intersection of Sixth Avenue and of Seventh Avenue at 59th Street, due to the fact, the circumstances, that north of 59th Street there ceases to be avenues with occupied buildings on each side of them and become simply rock and park?

[fol. 410] A. I should think it would make a difference, a decided difference. 59th Street is the only crosstown street for two miles to the north, so that it presumably has a far greater number of underground structures than would normally be the case—I mean longitudinally through the street.

Redirect examination by Mr. Davison:

I have only such knowledge from banking houses of the cost of financing as is common or public knowledge. I have no special knowledge. I have not received any personal communication from banking houses concerning the cost of marketing securities, nor has the company received any communications which have come within my knowledge. I have not had access to any statements made by banking houses on the cost of marketing securities—nothing more than general circularizing. Oh! I have received printed circulars, yes bunches of them but nothing in the nature of a personal communication.

R. D. Q. 298. Did those circulars purport to give the cost of selling securities for corporations?

Mr. Kingsbury: I press my objection to that as wholly incompetent.

The Master: Overruled. Let us find out if he had any.

Mr. Kingsbury: Exception.

The Witness: They frequently state the issuance of securities at certain par value for a certain discount below that, but I do not see that that necessarily proves the cost of marketing securities.

I testified that Mr. M. G. Starrett had given figures for administrative and legal expenses and that he was the person who actually [fol. 411] built these underground electric roads from 1897 to 1902 or 3. He testified in that case that he was engineer.

Mr. Kingsbury: I object to his repeating the testimony given by somebody else in another case.

The Master: I supposed he was simply going to answer the question that was put to him, that is, that he was the man.

Mr. Kingsbury: Even so, I object.

R. D. Q. 301. Do you know what his position was?
A. He said he was chief engineer for eight years.

Mr. Kingsbury: I do not want to be over technical, but I renew my motion to strike out. That is purely hearsay.

R. D. Q. 302. Have you any independent knowledge other than what he said that he was engineer for eight years?
A. I know from knowledge among engineers that he was.

The Master: I think I will let that stand.

By Mr. Kingsbury:

In the repairs which I testified were made to the track I obtained no information in regard to obstructions.

Mr. Davison: The plaintiff rests.
Mr. Kingsbury: The defendant, Transit Commission, moves to dismiss upon the ground that the plaintiff has failed to prove the case alleged in the complaint or any cause of action.
The Master: Motion denied, and exception, with the privilege to renew the motion at the end of the whole case.
[fol. 412] Mr. Fertig: Same motion for the defendant Swann.
The Master: Same disposition.
Mr. Fertig: Exception.

(Adjourned to January 25, 1923, at 10: 30 o'clock a. m.)

[fol. 413] New York, January 25th, 1923—10.30 o'clock a. m.

(Adjourned to 2 o'clock p. m.)

2 o'clock p. m.

Present: The Master; Mr. Davison and Mr. Scoville, for Plaintiff; Mr. Kingsbury and Mr. Stover, for Transit Commission; Mr. Fertig, for District Attorney Swann.

Harry S. Fischer, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Kingsbury:

I am satistician with the Transit Commission of the State of New York, in charge of the Bureau of Statistics. I have been associated with the Transit Commission or its predecessor since March, 1919. At that date it was the Public Service Commission. I was statistician at that time. I am in charge of an office of about fifteen or twenty people, statisticians and accountants. There are in my custody the monthly, quarterly and annual reports of the companies under the jurisdiction of the Commission. It is my function to compile statistics, based on these reports, on the finances and operations of

the companies which are operating under the jurisdiction of the Commission. These reports are taken from the books and records of the companies by their employees. They are sworn to by the proper official and are forwarded to the Commission under its orders.

I have made a special examination of the reports filed by the Belt Line Railway Corporation and compiled certain statistics therefrom. Among other things I have compiled a table of increase or decrease [fol. 414] in number of passengers, free transfers collected, and passenger revenue by months from January, 1921 to and including November, 1922, compared with the corresponding months in 1920. This is the paper which I have so prepared. All these figures are taken direct from the reports of the Belt Line Railway Corporation, excepting the revenue from two-cent fares, which had to be multiplied by the number of passengers in order to obtain the passenger revenue. The reports give the number of two cent passengers and I multiplied that number by two to reach this figure. This is in reference not only to this statement, but to other statements. This particular sheet contains only one column which has not been copied from the report and that is "Total Passengers." That is obtained by adding the total revenue passengers to the free transfers a mere matter of addition.

Mr. Kingsbury: I offer this in evidence.

(Marked Exhibit CT.)

I have also prepared a table of increases or decreases in number of passengers, transfers collected, and passenger revenues by months from January 1, 1921, to and including November, 1922, compared with corresponding months in 1920. The table which you show me is such statement. This was prepared in the same manner as the exhibit about which I last testified. This table relates to the Third Avenue Line of the Third Avenue Railway Company. It is the same statistics as in Exhibit CT, except that it applies to the Third Avenue Line of the Third Avenue Railway.

Mr. Kingsbury: I offer that in evidence.

Mr. Davison: I object on the ground that it is irrelevant and immaterial.

(Objection overruled; exception.)

(Marked Exhibit CU.)

I have prepared a similar table relating to the Lexington Avenue line of the New York Railways Company. The paper you show me is that table.

[fol. 415] Mr. Kingsbury: I offer it in evidence.

(Same objection; same ruling; exception.)

(Marked Exhibit CV.)

I have prepared a similar table relating to the Second Avenue line of the Second Avenue Railroad Company in the City of New York. This is it.

Mr. Kingsbury: I offer this in evidence.

Mr. Davison: I will make the objection that it is incompetent, irrelevant and immaterial.

(Same ruling; exception.)

Mr. Kingsbury: You do not object that it is not properly proved to be a tabulation from official reports, do you, because I do not want to waste a lot of time with that?

Mr. Davison: No.

The Master: He stated generally that he prepared these from the reports. That is quite sufficient for the purposes of a tabulation like this, unless atttention is called to something or other in regard to it.

(Marked Exhibit CW.)

I have prepared a similar table for the Broadway branch of the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company. This is it.

Mr. Kingsbury: I offer it in evidence.

(Same objection; ruling; exception.)

(Marked Exhibit CX.)

I have prepared a similar table relating to the Tenth Avenue line of the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company. This is it.

Mr. Kingsbury: I offer it in evidence.

(Same objection; ruling; exception.)

(Marked Exhibit CY.)

I have prepared a condensed income statement for the month of [fol. 416] September, 1922, and for the three months ended September 30th, 1922, compared with the corresponding months of the preceding year, 1921. This is it.

Mr. Kingsbury: I offer this in evidence.

(Marked Exhibit CZ.)

I have prepared a similar statement for the month of October, 1922, and the four months ended October 31, 1922. This is it.

Mr. Kingsbury: I offer this in evidence.

(Marked Exhibit DA.)

I have prepared a similar statement for the month of November, 1922, and the five months ended November 30, 1922, compared with the corresponding months of 1921. This is all the Belt Line. This is a copy.

Mr. Kingsbury: I offer this in evidence.

(Marked Exhibit DB.)

I have also prepared a condensed income statement of the Belt Line Railway Corporation for the fiscal year ended June 30, 1922, compared with the preceding fiscal year. This is it.

Mr. Kingsbury: I offer this in evidence.

(Marked Exhibit DC.)

CHARLES J. POMMERER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Kingsbury:

I am Supervising Transit Inspector of the Transit Commission of the State of New York. I have been associated with the Transit Commission or its predecessors in office a little over 15 years, as Transit Inspector and as Supervising Transit Inspector. Up to two years ago I had supervision over all lines in Manhattan and Staten Island. Since that time I am in charge of a traffic engineering bureau which has since been created. As supervising inspector, I make periodical inspections of the service furnished by the companies operating within the City. I have inspectors go out and make ob- [fol. 417] servations and they send in their notes and we make reports and tabulations and recommendations. Those notes indicate the number of cars passing a certain point in a certain time and the loading conditions. The persons who make these reports work under my direction.

By Mr. Kingsbury:

Q. 12. Do you remember any peculiar weather conditions in February, 1920, which affected the street railroads in New York City?

Mr. Davison: That is objected to as incompetent, irrelevant and immaterial.

The Master: There would be records here that would show exactly what the weather conditions were. They would be available and a certified copy would be just as good as calling the witness.

Mr. Kingsbury: I do not think it is necessary really for us to go into that. I want him to describe the conditions which existed for a number of days; in fact, they lasted for several weeks; as they came within his personal observations.

(Discussion.)

The Master: I will confine you to the testimony of persons who are testifying of their own knowledge, aided perhaps, by their own memorandum made at the time of what they saw.

Mr. Kingsbury: That is all I am asking for.

(Q. 12 read.)
A. I do.
Q. 13. Was there a very severe snow storm at that time?

Mr. Davison: Same objections.
The Master: Why do you not ask him what the condition was? Do not lead him.

Q. 14. Will you describe those conditions briefly.

[fol. 418] Mr. Davison: Same objection.

By the Master:

Q. 15. Limiting yourself to your own recollections of what you individually saw and not what anybody reported to you.
A. There was a very severe snow storm commencing on the evening of February 5 and lasting well into February 6.
Q. 16. How do you fix the date as being February 5 instead of the 7th or the 3rd? Is that just your unaided memory?
A. No, first I looked up my own records and I remember being in Staten Island on a hearing that night; had to go home in the snow storm. On the evening of February 5. The hearing closed at half-past nine. That is how I recollect it.

By Mr. Kingsbury:

Q. 17. How long did it last?
A. Until about morning. Stopped between midnight and early morning.
Q. 18. Do you remember the condition of 59th Street at that time and the days immediately following?

Mr. Davison: Same objection.
The Master: In the first place find out if he was on 59th Street.

By the Master:

Q. 19. When you came home from your meeting on Staten Island where did you go? Where were you living at the time?
A. I was living in Brooklyn at the time.
Q. 20. When did you next go to 59th Street?
A. The first thing the next morning.

By Mr. Kingsbury:

Q. 22. Describe the conditions in 59th Street when you visited it the next morning.

Mr. Davison: Same objection.

(Same ruling; exception.)

[fol. 419] A. I would have to refer to the memorandum now.

By the Master.

Q. 23. Is that your own memorandum?

A. Yes, sir.

Q. 24. That is not the report of one of your sub-inspectors? That is your own memorandum?

A. That is my own report I made at the time—Copied from the report I made at the time.

Q. 25. And it was part of your duty at the time, then, to make individual inspections and reports on them was it?

A. Yes.

Q. 26. All right.

A. 59th Street cars were stalled in 59th Street. There was no operation on the 6th during the day.

By Mr. Kingsbury:

Q. 27. Did you continue to keep the 59th Street line under observation for the next few days?

A. My men did, yes, and I did also.

Mr. Davison: I move to strike out the answer. He asked "Did you continue to keep it under observation?" and he said "My men did."

The Master: Yes.

Mr. Kingsbury: He finished it. He said "I did also."

(A. to Q. 26 continued.) I did, yes. But my time is limited. I could not confine it just to 59th Street. I glanced at it. The inspectors covered other lines.

By the Master:

Q. 28. Did you go over every day and look at the 59th Street line, if only for a little while, and then go elsewhere, or was there a day or two when you did not go over to the 59th Street line, being occupied some place else?

A. Personally, there were days when I did not go.

By Mr. Kingsbury:

[fol. 420] I could not offhand fix the dates on which I did personally visit 59th Street. I know by personal observation that the first regular operation was resumed on February 13th, and that only west of Third Avenue, whereas the terminal is First Avenue.

During the period between February 6 and February 13 I made personal observations of some of the street surface lines intersecting with the 59th Street line. I cannot state from my own recollection the conditions on these intersecting lines during that period. This is an abstract from my own personal reports I made at the time.

On the First Avenue line no service was operated across the intersection of 59th Street from February 5 to 26.

On the Second Avenue line no cars were operated across the intersection of 59th Street from February 5 to February 16, on which

day partial operation was resumed between 116th and 49th Streets. On February 19th this service was extended to 34th Street. On February 26th regular service was maintained between the northern terminal of the Second Avenue line and Tenth Street.

Third Avenue Line. On February 5 there was no operation south of 65th Street, and on February 7 operation had ceased entirely. On February 13th, the Third Avenue line was in operation between 65th and 162nd Street-, and only a shuttle operation existed between 42nd and 56th Streets. So that for six days there was no operation whatever across the intersection of 59th Street. On February 16, the Third and Amsterdam Avenue line was operated between 162nd and 42nd Street-.

Lexington Avenue Line. On February 5 operation on the Lexington Avenue line consisted of a shuttle service between 42nd and 85th [fol. 421] Streets. On February 7 a shuttle service was maintained between 60th Street and 99th Street. By "shuttle service" I do not mean that only one track was in condition and that one car ran up it and back. They used both tracks, but they ran in reverse direction. The cars stay on the same rails. On the evening of February 9, this line was operated between 99th and 23rd Streets. So that there was no regular service across the intersection of 59th Street from the morning of February 5 to the evening of February 9. On February 16 the service was found to be extended from 99th to 146th Streets, but there was still no operation south of 23rd Street. On the morning of February 20 regular service was operated to Bowling Green which is the southerly terminal of the Lexington Avenue line.

Broadway Branch line of the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company. Operation ceased on this line on the morning of February 5. No service was maintained across the intersection of 59th Street until February 13, when storage battery cars were operated between 42nd Street and 72nd Street. Trolley car service was resumed February 19 between 42nd and 181st Streets but the intervals were very irregular so that traffic relations between this line and the 59th Street crosstown line were still not normal.

Mr. Davison: I move to strike out that last sentence.
The Master: No, let it stand.
Mr. Davison: Exception.

Tenth Avenue branch line. Operation on this line ceased on the morning of February 5 and was not completely resumed for about three weeks, that is, over the entire line. They operated part of the line earlier and another part later.

During the storm conditions I did not examine the conduits on [fol. 422] the 59th Street line or of these other lines about which I have testified. I did examine the track. The slot in most places was plugged up, by the snow having been driven down through the slot and frozen. It got considerably colder after the snow had fallen.

Cross-examination by Mr. Davison:

I said that the north-and-south lines did not operate from the morning of February 5. The storm began on the 4th. That meet-

ing in Staten Island was on the 4th. I want to change that date right along to the 4th.

[fol. 423] WILLIAM O. SMITH, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Kingsbury:

I am a supervising transit inspector of the Transit Commission, State of New York. I have been associated with the Transit Commission or its predecessors in office a little over 15 years, as transit inspector and supervising inspector. There are seven supervising inspectors. Our duties require that I make inspections from time to time of traffic conditions in my territory, which at the present time is Manhattan and Staten Island, make reports to the Commission, investigate complaints, make recommendations to the Commission and make a general study of traffic conditions in general. My territory has included Manhattan and Staten Island a little over two years. Prior to that it was entirely outside of Manhattan Island.

As a matter of routine and whenever I received complaints regarding it, I made studies of the traffic conditions on the 59th Street line. I am fairly familiar with the condition on that line during the past two years. I have examined Exhibits CT to CY, inclusive, to some extent. From my own observation I know there is a seasonal variation in the amount of traffic on the 59th Street line of the Belt Line Railway Corporation.

Q. 13. Will you describe the nature of that seasonal variation?

[fol. 424] Mr. Davison: That is objected to as immaterial and irrelevant.

(Objections overruled; exception.)

A. The 59th Street line, as well as the other lines in that vicinity, shows quite a falling off in traffic during the summer months, during July and August particularly. That is due, I believe, to the fact that there is no school traffic during that time and a great many of the people in that section, as well as other sections of course——

Mr. Davison: I object to the conclusion of the witness. I think he is asked for facts now.

The Master: Yes, I think so too.

Mr. Davison: And I move to strike out what it is due to.

The Master: You have them going out of town, that is inference. Somebody else may have a different inference. I do not know that that is testimony. That is expert testimony. I am willing without any testimony to assume as a fact that the schools in New York are closed during July and August. I am willing to assume as a fact that a great many people that can afford to do so go out of town.

The Witness: There is a large school in the immediate neighborhood of 59th Street—the De Witt Clinton High School on the west end of the line. That is a large school.

Q. 18. In your examination of defendants' exhibits CT to CY inclusive, what if anything do you observe as to decreases upon one line and increases upon another at the same time?

[fol. 425] Mr. Davison: You are asking for the witness to read what the exhibits say?

The Master: I shall exclude that question because it is wholly unnecessary, I think. We have got it before us. You are asking him to testify what is in the blue prints in substance.

Mr. Kingsbury: Exception.

My services have been in all Boroughs. I was instrumental in forming the former transfer condition in Brooklyn, laid the plans for all of those different transfers. I have studied the transfer conditions in New York to some extent, not as extensively as that. I have studied transit conditions on all lines, making checks, time runs, and length of ride of passengers, and that sort of thing on all, or nearly all, surface lines throughout Greater New York, particularly in Brooklyn, Manhattan and Staten Island. That is what I have been doing for the last 15 years.

Q. 23. Will you please describe what alternatives a person seeking to travel from somewhere below 59th Street on the east side of town to somewhere on the west side of town near or above 59th Street has to choose from?

A. I will have to assume a point on Third Avenue, for instance, or somewhere below 42nd Street. If a person is at the corner of Third Avenue and 35th Street, we will say, at the present time, they can go north on the Third Avenue line and transfer to the 59th Street crosstown line and reach a point over at Columbus Circle. The 59th Street car, of course, goes right through. Of course, they [fol. 426] could go to Tenth Avenue and 54th Street. If that same person desired to make that same ride from Lexington Avenue and 35th Street, which is one block west——

By the Master:

Q. 26. Columbus Circle is at 8th Avenue, as I understand?

A. Eighth Avenue and 59th Street.

Q. 27. I thought that all the cars that run west as far as Eighth Avenue and 59th Street ran one block further before they turned on or off, or did anything?

A. They run over to Tenth Avenue and then down Tenth Avenue to 54th Street.

Q. 28. I understand you to say that he would have to stop when he got to the Circle.

A. No, I said he could stop there.

The Master: Read that answer.

(Answer read.)

Q. 29. I thought you said he could not get any further.

A. He can go further. Now, if that same person desired to make that ride from 35th Street and Lexington Ave. which is one block west, he would have to pay two fares to reach the same point.

By Mr. Kingsbury:

He could then take the Lexington Avenue Line and ride north to 59th Street and there transfer to the 59th Street crosstown line. That was the former route. Now, he would have to pay two fares, to make that ride.

If he were in the neighborhood of 42nd Street and Third Avenue, that would be very simple, he could go over to Columbus Circle then by taking the Broadway branch line. That goes west on 42nd [fol. 427] Street to Seventh Avenue, north on Seventh Avenue to Broadway, and north on Broadway to Columbus Circle.

Suppose he is somewhere above 42nd Street and in the neighborhood of Third or Lexington Avenue and he wishes to go up and west. Prior to the discontinuance of these transfers he would take either the Third or the Lexington Avenue line and transfer to the 59th Street crosstown line and take that ride. Now, of course, he must confine his ride to the Third Avenue line, if he desires to make it for the one fare. If he takes the Lexington Avenue line, it would be two fares, ten cents. If he is nearer the Madison Avenue Line, it would be the same condition there exactly. He would have to pay ten cents to make the ride that he formerly made for five cents.

Beginning with 34th Street and going north the crosstown lines are as follows: There is the 34th Street crosstown line, and the next is the 42nd Street crosstown line. The Broadway branch might be considered a crosstown line from Third Avenue to Seventh Avenue. Above that is the 59th Street crosstown line. The next crosstown line you reach is 86th Street. That runs from the East 92nd Street ferry to Central Park West and Eighth Avenue, through 86th and 85th Streets and the park. The next above that is 110th Street. That operates from Third Avenue through 110th Street and St. Nicholas Avenue to 125th Street and Hancock Place. The next above that is the 116th Street crosstown line. The next above that is 125th Street crosstown line. That operates from the East River to the North River.

Cross-examination by Mr. Davison:

The net results, so far as a passenger riding from the corner of 35th Street and Third Avenue is concerned, as compared with the [fol. 428] same passenger riding from the corner of Lexington Avenue and 35th Street, between the conditions as they are today and conditions as they existed prior to February 1, 1921, is that the passenger must walk one block. By walking one block he rides for a single fare. That same passenger who, we have assumed, commences his ride from Lexington Avenue and 35th Street by walking one block east to Third Avenue and 35th Street can go up Broadway

after he reaches Columbus Circle on the 59th Street line, for the same five cent fare. He can go on Broadway for the same five cent fare as far as 181st Street, making two physical transfers.

As conditions exist today, a passenger may start at the Post Office and Park Row and go to 181st Street and Broadway for a single five cent fare by travelling on the Third Avenue Line, the 59th Street line and the Broadway Line. He could go that way, or he could transfer to the Broadway branch line at 42nd Street and go that way, all for a single five-cent fare.

The same passenger can take the subway and transfer at Grand Central Station and go to Times Square and go north on the subway, all for a single five cent fare.

Central Park, between Fifth and Eighth Avenues, is between 59th Street and 110th Street.

I make examination of the 59th Street line when I receive complaints concerning the service there. From time to time I receive complaints, that the service is inadequate or irregular, something like that, something about service. I receive complaints of inadequacy. I have received complaints since the transfers were eliminated.

[fol. 429] Mr. Kingsbury: There was a matter which I intended to cover on the witness's direct examination, which I overlooked; so this is not re-direct; this is further direct examination.

Direct examination by Mr. Kingsbury (continued):

To some extent, I make a study of the expenses of operation as well as the actual conduct of operation of all companies. That study is used principally for my own benefit, not so much for the benefit of the Commission. I have watched the cost of operation per car mile on the lines, receipts per car mile, whether or not a line was increasing in revenue, and that sort of thing, taking my information on that subject from reports sent to the Commission by the companies. To some extent I have always done it, ever since I have been connected with the Commission. I think I am doing it now to a greater extent than I did before. I am able from the knowledge thus gained to express an opinion as to the relation between increase in traffic upon a given transportation line and increase in expense of operation.

Q. 70. Will you say what, in your opinion, is the relation between an increase in traffic and the increase if any in expense of operation attendant thereon?

Mr. Davison: That is objected to.

The Master: Objection sustained. I do not think the witness is qualified to answer that question.

Mr. Kingsbury: Exception.

By Mr. Kingsbury:

Q. 71. Have you observed the operation of the 59th Street line within the last two years?

A. Yes, sir.

[fol. 429½] Q. 72. Is that line in your opinion being operated to capacity? With the number of cars now operated on the line, could the operation be conducted, in your opinion, in such a way as to carry a larger number of passengers?

(Argument.)

The Master: I am willing to allow the witness to answer this question: He has watched the operation. If he can suggest to us in what way the operation, as he thinks, could be improved, I will take that testimony as his opinion. I will give you an exception to that, if you wish.

Mr. Davison: Yes.

By the Master:

Q. 73. Assuming you had the problem, in what way would you go to work to improve the service there? And then cross examination will show whether that is sound or not.

A. If the service requires improving——

Mr. Davison: I move to strike that out.

The Master: Yes, that is struck out. That is not the answer. You are asked to improve it. The assumption is that some improvement can be made, because your counsel has put a question to you that indicates that. Now, I say I will allow you to say what improvement you can make in that service as it stands today.

A. Why, I can make this improvement in it: by the operation of more cars at all hours of the day, the service can be improved.

By Mr. Kingsbury:

Q. 75. Could the service be improved, in your opinion, with the number of cars that are now being operated?

[fol. 430] The Master: He said he wants more cars.

Q. 76. Is there any other improvements you would make?

A. I do not believe there is.

By Mr. Kingsbury:

In my opinion a larger number of cars could be operated on that line without slowing up traffic. I cannot give you an exact figure as to how many more cars could be operated. I could give you an approximate figure. In the A. M. and P. M. rush hours about a ten per cent increase could be operated without slowing up the line—about ten additional cars an hour.

By Mr. Davison:

X Q. 80. That is, twenty for the rush hours in the morning and twenty for the rush hours in the afternoon.

A. No, ten.

X Q. 81. Well, the two hours are rush hours.

Mr. Davison: I do not mean to cross-examine now, I will reserve that.

The Master: Never mind about cross-examination. Let us get this answer straight and intelligible. From what he said I thought he meant twenty cars.

Mr. Davison: In the morning and twenty in the afternoon.

The Master: That is what I thought, but if it is different let him say so.

The Witness: Ten per cent an hour I should have said.

By the Master:

Q. 82. I know, but we do not care for percentage. We want the number of cars.

A. About ten cars in each of the rush hours, morning and night, considering two hours in the morning and two hours at night as the rush hour period.

[fol. 431] By Mr. Davison:

Q. 83. That is, 40 cars additional per day, is that right?

A. Forty trips additional per day, ten an hour—ten additional trips each hour.

The Master: Of course, the same car may be there several times, but it is counted as a car each time it runs. That does not mean that you have got to buy 40 new cars. It means there will be forty additional cars making their appearance during that period.

By Mr. Kingsbury:

I cannot say exactly how many cars are being operated on that line now. It is in the neighborhood of 55 or 60, if I remember correctly. I cannot tell, without calculating, how many cars would have to be added to the car equipment to furnish this additional number of trips. I cannot make that calculation here. I have not the material to do it with.

By the Master:

I could not say off hand what is the running time of the trip from the east terminus to the west terminus of the 59th Street line. I do not remember the running time. That is quite an important element when it comes to increasing the number of cars.

By Mr. Kingsbury:

I do not remember the exact figures as to the number of trips an hour that are being run during the rush hours now. Approximately 55 trips an hour. Probably I have mislead you folks in saying "cars" when I meant "Trips." I should have said "trip." [fol. 432] My whole testimony should refer to trip. I do not know

the number of cars, vehicles, operated upon the line. I said I did not know exactly how many trips per hour are operated on the 59th Street line during the rush hours. My answer was, approximately 55 trips an hour. A trip is the operation of a car from one end of the line to the other.

My best recollection is that they run under a little over one minute headway during the rush hour. They could be run under a shorter headway, without stalling traffic—I should say about 10% more trips an hour, which would be approximately ten more trips each hour. That would make a little less than one minute headway. I cannot give it in terms of seconds without calculating. It would be about 55 seconds, I presume.

By the Master:

The main stall places are at Columbus Circle, and then getting through 59th Street from Lexington to Third Avenues. Those are the heaviest places. There is some considerable delay, of course, at Fifth Avenue. The obstruction between Lexington and Third Avenue is the heavy automobile traffic going to the Queensborough Bridge. Speaking about the automobile traffic at the Queensborough Bridge, 59th Street is a one-way street eastbound. They come back on 60th Street.

By Mr. Kingsbury:

I cannot give you exact figures as to the operation in non-rush hours. They are operating now about 20 trips an hour. These [fol. 433] trips that I speak of are past a given point on the line. During the non-rush hours 20 cars would pass a given point on the line during an hour—one about every three minutes. The service during non-rush hours on the 59th Street line is sufficient to carry the passengers actually availing themselves of transportation there.

Cross-examination by Mr. Davison (continued):

My answer is not the same as to rush hours. The rush hour service is not sufficient, in my opinion. There is not very much difference on that line in the speed with which the cars run in the rush and non-rush hours. It is a trifle slower during the rush hours, on account of the loads that you carry and the fact that the cars are overcrowded, making it slower work for the passengers to enter or leave the cars. If you put on still more cars in the rush hours, I do not believe you would run a little slower still. If you reduced your overloading, you would naturally speed up the operation of the line.

I have observed at the congested points, during the rush hours how many cars are tied up one behind the other. I have made that observation in the vicinity of Lexington Avenue and 59th Street, at Fifth Avenue and at Columbus Circle. I have seen five or six cars piled up one behind the other at Lexington Avenue in the rush hours, all having passengers in them. They did not take on any passengers there. They were piled up owing to the heavy auto-

mobile trucking on that street and to the fact that you turn back [fol. 434] cars on a crossover near Third Avenue on 59th Street. I should say offhand that I had seen three or four cars piled up at Fifth Avenue and 59th Street, and about the same number at Columbus Circle.

The reason cars are turned back at Third Avenue is so as to furnish more service west of Third Avenue, where the greatest volume of service is.

I do not remember exactly the running time in the rush hours. The number of trips per hour, that I gave, was an approximate figure, if you will remember.

The layover at the end of the line is short. A layover is the length of time between the time a car arrives at a terminal and the time it leaves it again.

These cars are supposed to be operated on schedule.

Up to a certain point you can put on more cars in rush hours and not slow down the speed, I do not think you would have to have ten more cars in order to run these ten extra trips per hour. Not knowing the running time, I would simply have to guess at how many more cars would be necessary. I can say they would not need ten, because my best recollection is that it requires less than one hour to make the round trip. If you have more additional cars stalled or piled up at Lexington Avenue, that slows down the entire service.

Cross-examination by Mr. Fertig:

If you ran more cars within an hour, it might to some extent have a tendency to add to the number of cars that would be clogged [fol. 435] up at one point. Traffic would be improved, however, by getting quicker operation, getting the cars over the congested points faster, which can be done, turning back fewer cars on 59th Street near Third Avenue, thereby eliminating to a large extent that congestion. The adding of cars or trips would increase the service, if you get more cars past a given point in the hour. Those cars are held at these points through traffic regulations, and the very moment that the traffic regulations are raised, all of those cars go right through together. You can just as well run four or five through as you can three or four. That depends largely on what the regulation at the particular point is, the way the man handles it.

Redirect examination by Mr. Kingsbury:

The heaviest loading point on the 59th Street line is in the vicinity of Eighth Avenue and 59th Street. We also make checks east of Third Avenue and west of Tenth Avenue and 59th Street.

Recross-examination by Mr. Davison:

If you turned back less cars at Third Avenue and operated them through to the end of the line, that operation, regardless of any increase in the number of cars, would add to the car mileage, and increase the operating expenses. Without adding additional cars, it

would make less service between Third and Eighth Avenues. It might bring a little increased revenue east of Third Avenue, but no material increase. By not turning cars back at Third Avenue you would lengthen the trip and thus in two ways increase the car [fol. 436] mileage—first, by lengthening the trip and, second, adding more cars to the trips.

Redirect examination by Mr. Kingsbury:

With the traffic conditions as they actually exist on 59th Street, I do not believe that you could operate at much less than a 50 second interval successfully.

Mr. Kingsbury. I offer in evidence from the files of the Commission original letter from Winthrop and Stimson, addressed to Counsel for the Public Service Commission, dated November 29, 1920, and I ask leave to substitute a copy to be actually marked. As a part of this exhibit, three typewritten pages which were enclosed therewith are included.

Mr. Davison: Objected to as incompetent, irrelevant and immaterial.

(Objection overruled, exception.)
(Marked Exhibit D D.)

Mr. Kingsbury: I also offer press copy of letter to Messrs. Winthrop and Stimson, signed Terence Farley, who was at the time, counsel to the Public Service Commission, dated, eDcember 7, 1920, being a reply to the letter last introduced.

(Same objection; same ruling; exception.)
(Marked Exhibit D E.)

Mr. Kingsbury: Also letter from Winthrop and Stimson to Terence Farley, Esq., Counsel, dated, December 16, 1920.

(Same objection; ruling; exception.)
(Marked Exhibit D F.)

[fol. 437] New York, February 2nd, 1923—10:30 o'clock a. m.

Present: The Master; Mr. Davison and Mr. Scoville, for plaintiff; Mr. Kingsbury and Mr. Stover, for Transit Commission; Mr. Fertig, for District Attorney Swann.

[fol. 438] Walter J. Quinn, recalled, having been previously duly sworn, testified as follows:

Cross-examination by Mr. Fertig:

I testified as to the cost to reproduce the ducts and feeders on 59th Street from First to Tenth Avenue and on Tenth Avenue from 59th to the 54th Street car barn.

X Q. 122. Beginning at First Avenue, do you know anything about the duct bank formation along 59th Street and Tenth Avenue to 54th Street? How are they banked?

A. I cannot tell. I do not recall every section, but they vary all the way from three ducts to forty-eight in a bank.

X Q. 123. What is meant by a bank in this connection?

A. Where there are a group of ducts in one unit, we call it a bank.

By the Master:

Q. 124. So the three and the forty-eight mean individual units in a group?

A. Yes, a group made up of three ducts.

Q. 125. Sometimes of three and sometimes even as high as forty-eight?

A. Yes, and averaging in between.

By Mr. Fertig:

The duct usually has a 3½ inch hole—either round or square. That is, there is either a circular or square space. The exterior measure is about 4½ inches. They run from 3 to 48 of them. Four inches on the square is what we mean, four inches on the side. [fol. 439] I do not remember the layout of those ducts. I had the information at the office when I made my valuation, but I did not know you were going to ask in detail as to that. I used all that data in making my valuation. I have not that particular data with me. I can tell you right now just how many sections there are of the varying sizes.

By the Master:

Q. 135. But cannot tell exactly where each section is located?

A. No, I do not recall where that is.

The Master: Is that of importance to you, to know whether it is between First and Second or between Second and Third, so long as you have the quantities?

By Mr. Fertig:

I cannot give you the length of the sections either (referring to paper). There is one section of three ducts in a group, one section of four, three sections of five, seven sections of six, three sections of eight, seventeen sections of nine, eleven sections of twelve, sixteen sections of fifteen, ten sections of sixteen, thirteen sections of eighteen, one section of nineteen, one of twenty, twenty-six sections of twenty-four, one of twenty-six, one of thirty, three of forty, and seven of forty-eight.

Generally speaking, when we have the larger number of ducts running from 20 up to 48, in a bank of that size it would be about square. I would say six by eight. I do not recall exactly how they are laid out, but I have all that information showing the sections of [fol. 440] the ducts—the lengths of the sections.

Of the total number of duct feet, roughly 320,000, there are 137,124 feet of tile duct, and 135,276 feet of cement-lined entirely

on 59th street. And 31,951 feet of tile duct, and 15,593 feet of cement-lined, represent half of the ducts on Tenth Avenue from 54th to 59th Streets. I have not included the rest in the Belt Line Company's interest on that portion of track. The 42nd Street Company is joint owner of that track on Tenth Avenue from 59th Street to 54th Street. There is more on Tenth Avenue than I have included—twice as much. There is not included anywhere in these figures ducts that contain the feeders that bring the current from wherever it comes to the 59th Street Line. These are purely within the street limits, all of it is along 59th Street and Tenth Avenue.

I have testified to approximately 62,500 feet of cable. We have approximately 320,000 feet of duct. We have roughly about five times as many duct feet as we have feet of cable. The exact figure I testified to as to the feet of cable was 62,534.

X Q. 154. Now I want to ask you what was the need of five times as much duct space as there are feet of cable?

A. At the time those ducts were put in, the Belt Line was a part [fol. 441] of the general railroad system in the city here, and this was the only cross-town street between 59th Street and 116th Street on which there were trolley cars, and that was generally used as a transverse street for carrying cables. There were a good many more cables in there than the Belt Line had. We do not need all that duct space for the cables used in connection with the 59th Street Line.

X Q. 156. If you were reproducing the plant, you would not use 320,000 duct feet of duct, would you?

Mr. Davison: That is objected to as irrelevant and immaterial, because it is what is there now and not what modern science or thought would put in place of it.

(Objection overruled; exception.)

The Master: Reproducing the plant for what? For the sole purpose of operating between two points, one at 54th Street and Tenth Avenue and the other at 59th Street and First Avenue?

Mr. Fertig: Yes.

The Master: With no provision for extending beyond the points? That is your proposition now?

Mr. Fertig: Yes.

The Master: I should suppose it would hardly be necessary to ask the witness the question, but I will let him answer it.

A. I think not.

[fol. 442] Some of that duct space is still used by other companies. I have included the duct space used by other companies in this figure of 320,000. I cannot tell offhand how much of that 320,000 duct feet is used by other companies. When I say "other companies" I mean the New York Railways Company. The ducts used for the New York Railways Company are not used for car operation, but they are used to carry their power cables from First Avenue to Eighth Avenue. The New York Railways Company does

not run any cars along 59th street at all. The ducts are there to carry current to other points where the New York Railways Company operates.

Mr. Fertig: That is all, except for some detail.

Mr. Davison: Except what? Do you want the witness to come back?

Mr. Fertig: I will let you know later in the morning. I do not want him unless we feel that we absolutely need him.

The Master: You can specify not only that you do want him, but what it is you want him for, so that he can get up the data. Possibly when the data is gotten up you may be able to take the statement without having him come back on the stand.

Mr. Fertig: Yes, that is true.

Cross-examination by Mr. Kingsbury:

X Q. 164. Mr. Quinn, do you know under what arrangement these ducts which belong to the 59th Street Belt Line are used by the New York Railways Company?

A. Why, there is not any written agreement to that effect.

[fol. 442½] HARRY S. FISCHER, recalled, having been previously duly sworn, testified as follows:

Direct examination by Mr. Kingsbury (continued):

In connection with the preparation of the tables which were introduced on my examination at the last session, I also prepared certain comparative statements by years for each of the months from 1918 to date, showing the number of passengers, free transfers collected, and passenger revenue of the different lines concerning which I then testified.

I should like to correct the testimony of last time. The answer to question 14 reads: "All these figures are taken direct from the reports of the Belt Line Railway Corporation, excepting the revenue from the two-cent fares, which had to be multiplied by the number of passengers in order to obtain the passenger revenue." I should like to have that answer read: "All these figures are taken direct from the reports of the Belt Line Railway Corporation, except the last two columns." All the figures in these tables are taken direct from the reports of the Belt Line Railway Corporation excepting the figures from 1922 to the bottom of the table—January, 1922 to November, 1922, and except the column labeled "Total Passengers." Generally, the same is true of all the exhibits handed in, CT, CU, CV, CW, CX and CY. CZ is a condensation.

[fol. 443] There are further exceptions. The first line of Exhibit CT gives the figures for January, 1921, with a footnote: "as originally reported by corporation;" and the line January, 1921, with the footnote (b) beside it, as explained in the footnote says, "As ad-

justed by Corporation Report for the month of April, 1921." I give both the figures of the Company as originally reported and also the figures as adjusted after the indicated adjustment had been filed with the Commission on the Company's reports for April, 1921. Both lines came from a report of the Company, except that the line for January (b) is the January figure adjusted by merely the correction that was reported in April. Just the amount of the correction was reported by the Company as an adjustment, and that figure was subtracted from the figure reported by the Company originally; so we actually made the computation. The second line was not taken from a report of the Corporation for five cent fares.

The figures from January to November, 1922, were not taken directly from the Company's report. They were made up in this way: The basic figures were transcribed from the Company's reports on another tabulation and each subtraction was made for each month as indicated, so that the increases and decreases shown from January, 1922, to November, 1922, are taken from that basic tabulation. The figures of the Company reported for 1921 compare with the corresponding month of the preceding year. For 1922, the Company's reports make comparison with the preceding year, which is [fol. 444] 1921. So in order to make the comparison with 1920, it was necessary to make our own computation, because the computation of the Company's books was only directed to 1921.

This tabulation entitled "Belt Line Railway Corporation, 59th Street Line, Comparative Statement by Years for each of the Months from 1918 to date," date being November, 1922, showing the number of revenue passengers, free transfers collected, and passenger revenue, is a tabulation which I prepared from the reports of the Belt Line Railway Corporation.

Mr. Kingsbury: I offer this in evidence.

(Marked Exhibit DG.)

Q. 63. I show you a similar table entitled "Third Avenue Railway Company, Third Avenue Line," covering the same period and giving the same data.

Mr. Davison: I again make my objection to it as irrelevant and immaterial.

(Objection overruled; exception.)

Q. 63. (continued). Did you prepare this in the same way from the reports of the Third Avenue Railway Company?
A. Yes, sir.

Mr. Kingsbury: I offer this in evidence.

(Marked Exhibit DH.)

Mr. Davison: Exhibit DH has on it a statement of fact.
[fol. 445] The Master: That is struck out from the exhibit. There is testimony about the snowstorm, sworn testimony about the snowstorm.

Mr. Davison: I would rather take the testimony than I would this, that is all.

Mr. Kingsbury: There is no dispute about the fact.

Mr. Davison: No dispute at all. This is just a matter of accuracy, that is all.

Mr. Kingsbury: I consent that that be stricken from the face of the exhibit.

Q. 67. I show you a similar table entitled "Receiver, New York Railways Company, Lexington Avenue Line," and ask you if you prepared that in the same manner?

A. Yes, sir.

Mr. Kingsbury: I offer that in evidence.

(Same objection; same ruling; exception.)

Mr. Kingsbury: And I consent that the reference to the snowstorm which it bears on its face be likewise stricken out.

(Marked Exhibit DI.)

Mr. Davison: There is a statement in there, "Transfer Agreement of the Belt Line Railway Corporation was terminated." What you meant was the giving and receiving of transfers was terminated. [fol. 446] Mr. Kingsbury: I am perfectly willing to have that correction made.

Q. 68. I show you a similar statement entitled "Receiver, Second Avenue Railroad Company in the City of New York, Second Avenue Line," and ask you if you prepared that in the same manner?

A. Yes, sir.

Mr. Kingsbur-: I offer that in evidence and consent that the reference to the snowstorm be stricken out, and that the same correction be made in the reference to the transfer agreement.

(Same objection; same ruling; exception.)
(Marked Exhibit DJ.)

Mr. Davison: In other words, there was no transfer agreement to be testified to. The transfers were compelled by the order of which we are now complaining. You see my point, do you not?

Q. 69. I show you a similar statement entitled "42nd Street, Manhattanville and St. Nicholas Avenue Railway Company, Broadway Branch," consisting of two pages, and ask you if you prepared that in the same manner?

A. Yes, sir. That also goes to November, 1922.

Mr. Kingsbury: I offer that in evidence and consent that the reference to the snowstorm be stricken out.

(Same objection; same ruling; exception.)
(Marked Exhibit DK.)

Q. 70. I show you a similar statement entitled "42nd Street, Manhattanville & St. Nicholas Avenue Railway Company, Tenth Avenue Line," and ask you if you prepared that in the same manner?
[fol. 447] A. Yes, sir. The title should read "Passenger Statistics and Revenue for each month from January 1st, 1919, through November, 1922." It reads "October." There has been a month added.

Mr. Kingsbury: I offer this in evidence and consent that the reference to the snowstorm be stricken out.

(Same objection; same ruling; exception.)
(Marked Exhibit DL.)

The Witness: The footnote (a) down at the bottom was taken from the Company's report to the Commission.
I have been studying these traffic statistics for about three years, including the statistics of all the service lines operating in New York City.

By Mr. Kingsbury:

Q. 74. Is there any conclusion which can be drawn from these statistics of traffic in the City as to the effect upon habitual lines of travel when there has been a temporary cessation of traffic on any particular line?

Mr. Davison: That is objected to as incompetent.
The Master: I sustain the objection to that.
[fol. 448] Mr. Kingsbury: Am I not entitled to have it on the record the same as other things that have been objected to?
The Master: Yes. The objection is sustained and exception taken, and under Blease v. Garlington, the answer of the witness is recorded as follows:
A. Yes. The general conclusion might be drawn that where operations on the surface lines have been suspended for a period of time, about a month or two or longer—I do not mean a day or two, but about four weeks or more, the traffic from the surface lines is directed to the subways and rapid transit lines, and that not all of this traffic returns to the surface lines when they begin operations again. Some of it would go to other surface lines which have not ceased operation.

The Master: Of course, Mr. Davison, that is being admitted under Blease v. Garlington. You are not prejudiced by cross-examining him on anything which is taken in irrespective of the exception.

Cross-examination by Mr. Davison:

I know of a suspension of lines in Manhattan for four weeks or more during a strike in 1916. I cannot say exactly which line. I [fol. 449] was not with the Commission. In 1916, I was in New York City. I was a student in the College of the City of New York, in the regular collegiate course. My knowledge that there were lines

suspended in 1916 for four weeks because of a strike is based on a report of the Public Service Commission to the Legislature. I do not recall whether that report stated that there were lines on which there was no operation at all for four weeks. That was the report of the Public Service Commission for the First District to the Legislature for the fiscal year ended June 30th, 1917. Outside of that report I have no knowledge that the lines were suspended for four weeks. I do not know of any places other than the Borough of Manhattan where there was a suspension for four weeks.

Exhibits DG to DL inclusive, were taken from the reports of the Belt Line Railway Corporation and other corporations to the Commission, except that Column on "Total Passengers," which was the sum of the two preceding columns. That is the only change.

[fol. 450] WILLIAM O. SMITH, recalled, having been previously duly sworn, testified as follows:

Direct examination by Mr. Kingsbury:

At the present time transfers are exchanged at Third Avenue and 59th Street with the Third Avenue line, at Broadway or Columbus Circle with the Broadway Branch line; and at Tenth Avenue and 59th Street with the Tenth Avenue line of the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company.

Transfers were formerly exchanged with the Second Avenue Railroad Line at 59th Street and Second Avenue; with the Lexington Avenue Line at Lexington Avenue and 59th Street; with the Sixth Avenue Line at Sixth Avenue and 59th Street; the Seventh Avenue Line at Seventh Avenue and 59th Street.

Cross-examination by Mr. Davison:

At the present time transfers are given and received at First Avenue and 59th Street. I did not include them among the present transfers.

Redirect examination by Mr. Kingsbury:

Before I entered the service of the Commissioner, I was engaged in the railroad business. I was with the companies that make up the Brooklyn Rapid Transit System for upwards of seventeen years, as shop man, lineman, motorman, conductor, inspector, assistant superintendent, and general office. In those various capacities I studied traffic conditions in the system with which I was connected.

R. D. Q. 177. Did you make any observation as to the effect of a temporary cessation of traffic on any particular line for a substantial period more than a day or so?

A. That is a thing, I believe, that I learned through my railroad experience, rather than any particular study of any particular situation.

R. D. Q. 178. And what did you learn in this way?

Mr. Davison: I object to that as incompetent, irrelevant and immaterial.

[fol. 451] Mr. Kingsbury. Expert testimony.

Mr. Davison: You mean, anywhere?

The Master: That is the particular question you put in it? Objection sustained.

Mr. Kingsbury: I will reframe the question.

R. D. Q. 179. Have you observed any particular cases of suspension of traffic, and if so, what?

Mr. Davison: Same objection.

(Objection overruled; exception.)

A. Why yes.

Mr. Davison: It calls for an answer yes or no. That is all.

The Master: Yes.

Mr. Kingsbury: No, I said "and if so, what?"

Mr. Davison: That is two questions in one, then. I object on the ground it is irrelevant, incompetent and immaterial.

(Objection overruled; exception.)

A. I have noted instances where through strikes and heavy storms, operation on lines has been suspended for a considerable length of time, and it seems to be a general fact that where traffic——

By the Master:

Q. 180. Never mind "seems to be a general fact." You are telling us now what you saw on those occasions when that thing happened. What did you observe with regard to those instances where you had connection with some heavy storm or general strike by being on the road or in the spot at the time? What did you observe?

A. We have observed over a period of time that where traffic is diverted from a line through its failure to operate to some other line, it takes a considerable length of time to get that traffic back, if ever. The particular case in mind was a strike in Brooklyn where the Broadway surface lines were tied up for a considerable length [fol. 452] of time. I do not just remember the length of time now.

Q. 181. Do you mean the strike where the militia was out over there?

A. No, it was since that. That was the strike of 1896 that you refer to. It is one of the strikes since then. The strike of 1899; I am not sure of that. Traffic was driven from the surface lines to the Broadway elevated line and it was a very long time before the Broadway surface line, after it resumed operation, got that traffic back.

Another case in mind is a strike in Brooklyn some three or four

years ago where the lines across the Williamsburg Bridge were suspended and the traffic went to the Grand Street and Post office lines, and it was a long time before that traffic got back. In fact, it was never all gotten back. The people had found other routes that possibly they did not know about before and were satisfied with those routes rather than to go back to their original lines.

Recross-examination by Mr. Davison:

This Broadway line I speak of was in Brooklyn. The strike I think, was in 1899, about that time. There were two or three strikes two or three years ago. In the last part of my testimony I was talking about one three or four years ago. The Broadway line was longer ago than that, about 1899, I should say.

Redirect examination by Mr. Kingsbury:

The Tenth Avenue line of the 42nd Street, Manhattanville & St. Nicholas Avenue Railway Company operates—I am reading now from the tariff—operates from the West Shore Ferry, that is at the foot of West 42nd Street, east on 42nd Street to Tenth Avenue, north on Tenth Avenue to Amsterdam Avenue, north on Amsterdam Avenue to Broadway, north on Broadway to 125th Street, and west on [fol. 453] 125th Street to Fort Lee Ferry loop. That is the North River. The single track mileage or mileage in one direction is 4.91 miles.

The Broadway Branch Line of the 42nd Street, Manhattanville & St. Nicholas Avenue Railway Company operates from 42nd Street and Third Avenue, West on 42nd Street to Seventh Avenue, north on Seventh Avenue to Broadway, north on Broadway to 125th Street, east on 125th Street to Amsterdam Avenue, north on Amsterdam Avenue to St. Nicholas Avenue, north on St. Nicholas Avenue to Broadway, and north on Broadway to 181st Street. The mileage is 8.26 miles.

The Lexington Avenue line of the New York Railways Company operates from Bowling Green north on Broadway, east on 23rd Street, north on Lexington Avenue to 131st Street. It also has a branch line that operates west on 116th Street to Lenox Avenue and north on Lenox Avenue to 146th Street.

Mr. Davison: That is over my objection, as regards New York Railways.

The Master: Yes.

Mr. Davison: Exception.

A. (continued). The length of the line from Bowling Green to Manhattan Avenue and 131st Street is 8.58 miles, and the length of the line from Lenox Avenue and 146th Street to Bowling Green is 9.82 miles.

The Third Avenue Line of the Third Avenue Railway Company operates from Park Row and the Post Office, north on Park Row and the Bowery and Third Avenue to 125th Street, west on 125th Street to Amsterdam Avenue, and north on Amsterdam Avenue to 195th

Street and Amsterdam Avenue. The length of that line is 12.54 miles.

[fol. 454] The Second Avenue line of the Second Avenue Railroad Company operates from 129th Street and Second Avenue to Broadway and Worth Street. It is operated via Second Avenue, Christie Street, Grand Street, Bowery and Worth Street. The distance is 7.75 miles. They go through a slightly different route on the northbound trip. They go through Forsythe Street instead of Christie Street.

Mr. Kingsbury: The Defendant Transit Commission rests.

(Adjourned to February 8th, 1923, 2 o'clock p. m.)

New York, February 8th, 1923.

(Adjourned to February 14, 1923, at 10.30 o'clock a. m.)

New York, February 14, 1923, at 10.30 o'clock a. m.

Present: The Master; Mr. Davison and Mr. Scoville, for plaintiff; Mr. Kingsbury and Mr. Stover, for Transit Commission; Mr. Fertig, for District Attorney Swann.

Mr. Fertig: Mr. Quinn was to submit more data. If they do not care about putting it in, I am going to let the record stand as it is.

Mr. Davison: I will produce any witness that Mr. Fertig wishes to cross-examine if he will name him.

Mr. Fertig: Was not Mr. Quinn to furnish a statement?

Mr. Davison: He was to furnish something but he has never been told what to furnish and no one has yet said what you want.

Mr. Fertig: We asked for the duct bank construction on 59th Street. The record will show that. In addition to that, Mr. Sheri-[fol. 455] dan, Mr. Quinn, and Mr. Davison together went over the matter and Mr. Sheridan asked Mr. Quinn whether he thoroughly understood what was desired and he said yes, he would produce it.

Mr. Davison: In linking my name with Mr. Sheridan's it is entirely untrue. Here are the blue prints showing the construction of the duct banks on 59th Street.

Mr. Fertig: Your Honor, I am informed by Mr. Sheridan that it will require at least one-half hour to determine whether we desire to proceed farther in this matter.

The Master: Take the time needed to find out.

Mr. Fertig: Aside from that, the District Attorney rests.

The Master: Both Transit and District Attorney have rested. That is exclusive of what may happen when the gentleman has looked over the blue prints and see if there is anything further wanted.

Mr. Davison: Up to this time we have nothing further, your Honor.

The Master: We will wait here until the gentleman has looked over the blue print.

Mr. Kingsbury: Subject to the disposition of the blue prints which are now being examined, the defendant Transit Commission renews the motion made at the conclusion of the plaintiff's case to dismiss the suit upon the grounds then stated, namely, that the plaintiff had failed to prove the cause of action alleged in the bill of complaint and has failed to prove any cause of action in equity, and upon the further special ground that there is a complete failure of proof upon the point that the added expense if any, of compliance with the transfer order which is attacked in this litigation exceeds the added revenue derived or which would be derived from the transfer passengers under the order.

[fol. 456] Mr. Fertig: I desire, for the District Attorney to make the same motion as just stated by Colonal Kingsbury and upon the same grounds.

(Discussion.)

Mr. Fertig (after examination of the blue print): We will have this go into the record. Who is responsible for it?

Mr. Davison: I produced it as representing the lay-out of those ducts on 59th Street.

The Master: Being a blue print purporting to represent them and kept in the records of the company.

Mr. Davison: A copy of our record.

Mr. Fertig: Counsel is not a witness, but under the circumstances, I will take it as if the witness had sworn to the authenticity of them and how they were kept up and so on.

(Marked Exhibits Dm, DM2, DM3, DM4 and DM5.)

(Discussion.)

Mr. Davison: If there is any further testimony, Colonel Kingsbury, I shall let you know.

(Briefs to be submitted.)
(Case closed.)

[fol. 457] STATEMENT RE EXHIBIT A

Exhibit A (for Identification)

Map of the railroad lines in Manhattan affected by the matters in this controversy.

Lines of entire Third Avenue System.

(Omitted.)

[fol. 458] EXHIBIT B

This indenture, made this nineteenth day of December, One thousand nine hundred and twelve, between Isham Henderson, as Master Commissioner (hereinafter called "Master Commissioner"), duly appointed in and by a certain decree of foreclosure and sale made and entered by the Circuit Court of the United States for the Southern District of New York on February 16th, 1911, and filed in the office of the Clerk of said Court, in the City of New York on said day, in a cause in equity pending in said Court, wherein The Farmers' Loan and Trust Company, Trustee, was complainant and Central Park, North and East River Railroad Company and others were defendants, party of the first part, said Isham Henderson residing at No. 970 Park Avenue, in the Borough of Manhattan, in the City, County and State of New York; The Farmers' Loan and Trust Company, a corporation organized and existing under the laws of the State of New York, as trustee under a mortgage made by said Central Park, North and East River Railroad Company, and bearing date December 1st, 1872 (hereinafter called the "Trustee"), party of the second part, said The Farmers' Loan and Trust Company having its principal office and place of business at No. 22 William Street, in the Borough of Manhattan, in the City, County and State of New York, and Edward Cornell (hereinafter called the "Purchaser"), party of the third part, said Edward Cornell residing at Central Valley in the State of New York:

Whereas said Central Park, North and East River Railroad Com-[fol. 459] pany, a corporation organized under and pursuant to the laws of the State of New York (hereinafter called the "Railroad Company"), did, on or about the first day of December, 1872, make, execute and deliver to The Farmers' Loan and Trust Company, as Trustee, a certain mortgage or deed of trust dated on said day, to secure an issue of One Million two hundred thousand Dollars ($1,200,000) in principal face amount of Bonds of said Railroad Company, all of which were duly executed and issued by said Railroad Company; and

Whereas, on or about June 24th, 1908, said The Farmers' Loan and Trust Company, as trustee as aforesaid, filed its bill in equity in the Circuit Court of the United States for the Southern District of New York against said Railroad Company and others, and prayed, among other things, for the foreclosure of the said mortgage, and such proceedings were thereafter had in said cause that on the 16th day of February, 1911, the said decree of foreclosure and sale was duly entered by said Circuit Court of the United States for the Southern District of New York; and

Whereas, said Isham Henderson, the party hereto of the first part, was in and by said decree appointed Master Commissioner to make the sale thereby ordered and decreed, and to make and deliver a deed of conveyance and bill of sale of the property decreed to be sold to the purchaser thereof upon the confirmation of such sale and completion of the payment of the entire purchase price as in said decree provided; and

[fol. 460] Whereas, said Isham Henderson, Master Commissioner as aforesaid, duly gave notice of sale in accordance with the provisions of said decree of the time and place of the sale under said decree, and of the manner and terms under which said sale was to be conducted, and duly complied with all the provisions of said decree relating to said sale, and in pursuance to said decree, at the place specified therein, to wit, at the north main entrance of the County Court House of the County of New York, in the City of New York, in the State of New York, did, on the 14th day of November, 1912, sell at public auction to Edward Cornell, party hereto of the third part, being the highest bidder at said sale, and having duly qualified as a bidder thereat, in the manner privided in said decree, all and singular the premises and property, real, personal and mixed, rights, privileges, muniments and franchises in and by said decree directed to be sold at and for the sum of One million six hundred and seventy-three thousand dollars ($1,673,000) and

Whereas, thereafter, to wit, on the 15th day of November, 1912, said Isham Henderson, as Master Commissioner as aforesaid, did duly make and file his report of said sale, and by decree duly entered in said cause on November 21st, 1912, the said report of sale was in all things approved, and, confirmed and said sale therein reported was approved, ratified, confirmed and made absolute, subject, however, to all the terms and conditions of the said decree of foreclosure entered by said Court on February 16th, 1911, as aforesaid, and to such orders as the said Court might thereafter make in said cause [fol. 461] pursuant to said decree, for the purpose of carrying into effect any of the provisions of said decree, and to the due performance by the said Purchaser, his successors or assigns of all the obligations therein described; and

Whereas, in and by said decree of foreclosure and sale it was further provided that upon the completion of the payment of the entire amount bid by the Purchaser, his successors or assigns, to the said Master Commissioner, the said Purchaser, his successors and assigns should be entitled to receive a deed of conveyance and bill of sale of the property purchased from the said Master Commissioner, and also conveyances of said property executed by the Farmer's Loan and Trust Company, the complainant in said cause, and the said Central Park, North and East River Railroad Company, defendant, therein, by way of confirmation and further assurance of title to the said Purchaser, his successors or assigns; and

Whereas, the said Purchaser, party hereto of the third part, has in all respects complied with the provisions of said decree of foreclosure and sale with reference to the payment of the amount of the bid made by him as aforesaid at said sale, and has paid the amount of his said bid as provided in said decree:

Now, therefore, this indenture witnesseth:

That the said Isham Henderson, as Master Commissioner as aforesaid, party hereto of the first part, in order to carry into effect the said sale made by him and in pursuance of the aforesaid decree, and [fol. 462] in consideration of the premises and of the payment as

aforesaid of the amount bid by the said Purchaser at said sale, to wit, the sum of One million six hundred and seventy-three thousand dollars, ($1,673,000) the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey, and the said The Farmers' Loan and Trust Company, Trustee, party hereto of the second part, by way of confirmation and further assurance of title to the said Purchaser, has transferred and released, and by these presents does transfer and release to the said Purchaser, Edward Cornell, the party hereto of the third part, his heirs, executors, administrators and assigns, forever, all and singular the premises and property, real, personal and mixed, rights, privileges, muniments and franchises so sold as aforesaid, and covered by or embraced in the said mortgage of said Central Park, North and East River Railroad Company dated December 1st, 1872, and in and by said decree of February 16, 1911, directed to be sold as aforesaid, the said premises and property, rights, privileges, muniments and franchises, being in said mortgage and in said decree and in the notice of said sale described as follows (the words "party of the first part" in said description referring to the said Central Park, North and East River Railroad Company, and the Act of the Legislature of the State of New York mentioned in said description being the Act entitled "An Act to Authorize the Construction of a Railroad on South, West and certain other streets in the City of New York," passed April 17th, 1860; and the Certificate mentioned in said description being the certificate of Incorporation [fol. 463] of said Central Park, North and East River Railroad Company filed in the office of the Secretary of State of the State of New York on or about the 19th day of July, 1860):

"All those thirty-four certain lots, pieces or parcels of land, situate, "lying and being in the Twenty-second Ward of the City of New "York, which taken together are bounded and described as follows, "namely: Beginning at the southwesterly corner of Fifty-fourth "street and Tenth Avenue; thence running westerly along the "southerly side of Fifty-fourth street, Four hundred and twenty-"five feet; thence southerly and parallel with Tenth Avenue, Two "hundred feet ten inches to the northerly line of Fifty-third Street; "thence easterly along the said northerly line of Fifth-third street, "Four hundred and twenty-five feet to the southwesterly corner of "Fifty-third street and Tenth Avenue; and thence northerly along "the westerly line of Tenth Avenue, Two hundred feet ten inches, "to the place of beginning:

"Together with the Depot Buildings thereon erected, and all and "singular the tenements, hereditaments and appurtenances there-"unto belonging or in anywise appertaining, and the reversion and "reversions, remainder and remainders, rents, issues and profits "thereof and also all the estate, right, title, interest, property, posses-"sion, claim and demand whatsoever, as well in law as in equity of "the said party of the first part of, in and to the same, and every "part and parcel thereof, with the appurtenances. Also, all and

"singular the rights, privileges, franchises, authority and powers "held, owned and possessed by the said party of the first part, as "aforesaid, and also all and singular the lines of railroad now con-"structed or hereafter to be constructed on the streets and avenues "described and set forth in its said certificate, and in the said Act of "the Legislature of the State of New York, and on such other streets "or avenues as the said party of the first part may at any time herein-"after be permitted to use for that purpose; with all the franchises "and rights, power, privilege, and authority which may hereafter "be acquired by the said party of the first part, to use such other "streets and avenues, and all rails, ties, stringers, chairs, and all "structures and materials for structures, now appurtenant or belong-"ing to the said railroad or which may be, at any time hereafter to "said Road appurtenant or belonging, by what name soever desig-"nated, and all rolling stock, horses, harness, tools, implements, "maps, surveys, profiles, and all other personal property of whatever "name or nature, now belonging to said party of the first part, or [fol. 464] "which may hereafter be acquired by it, or its successors, "and also all real estate, Depot grounds, and grounds for storage now "owned, or which may hereafter at any time be acquired by the party "of the first part, and all shops and stables, and all other erections "now owned or hereafter to be owned or constructed by the party of "the first part on said real estate hereinbefore described, or upon any "other real estate, and all other property of every name and nature, "real, personal or mixed, which may hereafter be acquired by said "party of the first part or its successors and all other property rights, "interests, privileges franchises, authority and powers of what name "or nature soever, now owned or which may hereafter be acquired "by the said party of the first part."

Including the following parcels of real estate acquired by the said Central Park, North and East River Railroad Company subsequently to the date of the said mortgage and now subject to the lien of said mortgate, all of said parcels being situated in the Borough of Manhattan, City, County and State of New York:

"(a) The parcel of real estate conveyed to the said Central Park, "North and East River Railroad Company, by John A. Morrison, "by deed dated March 10th, 1875, and recorded May 11th, 1875, in "Liber 1323 of Conveyances of the Register's office for the County of "New York, page 466 et seq. and in the said deed described as fol-"lows: 'All those certain lots, pieces or parcels of ground, situate, "lying and being in the 22d Ward of the City of New York and "bounded and described as follows: Beginning at a point on the south "side of 54th Street in said City distant 350 feet easterly from the "southeast corner of the 11th Avenue and 54th Street, running "thence easterly 25 feet along the southerly line of 54th Street; "thence southerly parallel to 11th Avenue through the centre of the "block to the line of property owned by Garrit H. Striker 162 feet "11½ inches; thence northwesterly along the line of said property "25 feet 3¼ inches; thence northerly parallel to 11th Avenue 159 "feet and 6¾ inches to the place of beginning.'

"(b) The parcel of real estate conveyed to the said Central Park, "North and East River Railroad Company by Jennie McDonald and "John McDonald, her husband, by deed dated November 15th, 1881, "and recorded November 26th, 1881, in Liber 1628 of Conveyances "of the Register's office for the County of New York, page 198 et seq., "and in said deed described as follows: 'All that certain piece or par-"cel of land, lying and being in the 22nd Ward of the City of New "York situated on the north side of 53rd Street between 10th and "11th Avenues and known as Lot No. 769 on a certain map of John "Hopper estate filed in the Register's office of the City of New York, "December 31, 1864, as Map No. 660, and being bounded and de-[fol. 465] "scribed as follows: Beginning at a point on the northerly "side of 53rd Street distant 450 feet westerly from the westerly side "of Tenth Avenue and running thence westwardly along the north-"erly side of 53rd Street 25 feet; thence northwardly on a line paral-"lel with Tenth Avenue 44 feet 10 inches; thence southeastwardly 25 "feet or thereabouts to a point in a line distance 41 feet 4¼ inches "northwardly from the north side of 53rd Street and thence south-"wardly on a line parallel with 10th Avenue 41 feet 4¼ inches to the "northerly side of 53rd Street to the point or place of beginning.'

"(c.) The parcel of real estate conveyed to the said Central Park, "North and East River Railroad Company, by Margaret Kampfner "and August Kampfner, her husband, by deed dated October 27th, "1881, and recorded November 1st, 1881, in Liber 1621 of Convey-"ances, of the Register's office for the County of New York, page "298 et seq., and in said deed described as follows: 'All that certain "lot, piece or parcel of land, lying and being in the 22nd Ward of "the City of New York situated on the northerly side of 53rd Street "distant 425 feet westwardly from the westerly side of 10th Avenue; "running thence westwardly along said northerly side of 53rd Street "25 feet; thence northwardly on a line parallel with 10th Avenue 41 "feet 4¼ inches; thence southeastwardly 25 feet or thereabouts to a "point in a line distant 37 feet 10½ inches northwardly from the "northerly side of 53rd Street; and thence southwardly on a line "parallel with 10th Avenue 37 feet 10½ inches to the northerly side "of 53rd Street to the point or place of beginning.'

"(d.) The parcel of real estate conveyed to the said Central Park, "North and East River Railroad Company, by John Foersch and "Theodora, his wife, by deed dated September 22nd, 1891, and "recorded September 28th, 1891, in Liber 9 of Conveyances, Section "4, in the office of the Register of the County of New York, pages 67 "et seq., and in said deed described as follows: 'Certain lots in the "22nd Ward of the City of New York bounded and described as fol-"lows: Beginning at a point on the southerly line of 54th Street dis-"tant 325 feet easterly from the southeasterly corner of 54th Street "and 11th Avenue; running thence easterly 25 feet along the south-"erly line of 54th Street thence southerly parallel to the 11th Avenue "through the centre of the block to the line of property owned by "Garrett H. Striker 159 feet 6¾ inches; thence northwesterly along "the line of said property 25 feet and 3¼ inches; thence northerly

"parallel to 11th Avenue 156 feet to the point or place of begin-
"ning.' "

To have and to hold all and singular the premises and property, rights, privileges, muniments and franchises above mentioned and [fol. 466] described, and hereby granted, bargained, sold, conveyed, released and confirmed, or intended so to be, unto said Edward Cornell, party hereto of the third part, and to his heirs, executor, administrators and assigns forever.

Subject, however, to all the terms and conditions of said decree of foreclosure and sale of February 16th, 1911, and said decree of confirmation of November 21st, 1912, and to such orders as said Court may hereafter make in said cause pursuant to said decree for the purpose of carrying into effect any of the provisions thereof, and to the due performance by the said purchaser, his successors or assigns of all the obligations therein described whether in this Indenture expressly referred to or not.

No personal covenant or liability shall be implied against the said parties of the first or second parts to this Indenture, or either of them, by reason of the execution of this deed, or of any recital herein contained; and it is understood that none of the recitals contained in this Indenture are made by or on behalf of the said party of the second part.

In witness whereof, the said Master Commissioner, the party hereto of the first part, has hereunto set his hand and seal, and the said Trustee, party hereto of the second part, has caused these presents [fol. 466½] to be executed by its President, and its corporate seal to be hereunto affixed, attested by its Secretary, the day and year first above written.

Isham Henderson, Master Commissioner. (Seal.) The Farmers' Loan and Trust Company, as Trustee under said Mortgage of said Central Park, North and East River Railroad Company dated December 1st, 1872, by E. S. Marston, President. Attest: A. V. Healy, Secretary. (Seal.)

Sealed and delivered in the presence of Thos M. Healy.

United States of America,
State and County of New York,
Southern District of New York, ss:

On this 19th day of December, one thousand nine hundred and twelve, before me personally came Isham Henderson, to me known and known to me to be one of the persons described in and who exe- [fol. 467] cuted the foregoing instrument as Master Commissioner, and he acknowledged to me that he executed the same as such Master Commissioner, for the purposes therein expressed.

Thos. M. Healy, Notary Public, Kings County. Certificate filed in New York County No. 45. Register's office certificate, New York County No. 3146. (Seal.)

United States of America,
State and County of New York,
Southern District of New York, ss:

On this nineteenth day of December, in the year one thousand nine hundred and twelve, before me personally came Edwin S. Marston, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is the President of The Farmers' Loan and Trust Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Leslie M. McCrum, Commissioner of Deeds, City of New York. Cert. filed in N. Y. County, No. 13. (Seal.)

[fol. 468] Exhibit C

In the United States Circuit Court for the Southern District of New York

The Farmers' Loan and Trust Company, Trustee, Complainant,

vs.

Central Park, North and East River Railroad Company, Metropolitan Street Railway Company, Adrian H. Joline and Douglas Robinson, as Receivers of Metropolitan Street Railway Company; New York City Railway Company, Adrian H. Joline and Douglas Robinson, as Receivers of New York City Railway, Company; Morton Trust Company, Trustee; The Guaranty Trust Company of New York, Trustee; The Pennsylvania Steel Company, The Degnon Contracting Company, and Central Cross-Town Railroad Company of New York, Defendants.

Decree

This cause came on to be heard as this term upon the pleadings and proofs and upon all the papers on file and proceedings herein, and upon the order entered herein on the 14th day of October, 1910, for a decree pro confesso against the defendants The Degnon Contracting Company, Metropolitan Street Railway Company, New York City Railway Company, The Pennsylvania Steel Company, Central Cross-Town Railroad Company of New York, and Adrian H. Joline and Douglas Robinson as Receivers of New York City Railway Company; and the same was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed as follows, to wit:

I. That all and singular the material allegations in the bill of complaint herein are true.

[fol. 469] II. That the mortgage set forth in the bill of complaint herein, made by the defendant Central Park, North and East River Railroad Company to the complainant, The Farmers' Loan and Trust Company, bearing date the First day of December, 1872, is a valid and subsisting mortgage and constitutes a lien upon the mortgaged premises, property and franchises described in said mortgage as follows (the words "party of the first part" in said description referring to the said Central Park, North and East River Railroad Company; and the Act of the Legislature of the State of New York mentioned in said description being the Act entitled "An Act to authorize the construction of a railroad on South, West, and certain other streets in the City of New York, "passed April 17th, 1860; and the Certificate mentioned in said description being the Certificate of Incorporation of said Central Park, North and East River Railroad Company filed in the office of the Secretary of State of the State of New York on or about the 19th day of July, 1860):

"All those thirty-four certain lots, pieces or parcels of land, situate, lying and being in the Twenty-second Ward of the City of New York, which taken together are bounded and described as follows, namely: Beginning at the southwesterly corner of Fifty-fourth street and Tenth Avenue; thence running westerly along the southerly side of Fifty-fourth street, Four hundred and twenty-five feet; thence southerly and parallel with Tenth Avenue, Two hundred feet ten inches to the northerly line of Fifty-third Street; thence easterly along the said northerly line of Fifty-third street, Four hundred and twenty-five feet to the southwesterly corner of Fifty-third street and Tenth Avenue; and thence northerly along the westerly line of Tenth Avenue, Two hundred feet, ten inches, to the place of beginning:

Together with the Depot Buildings thereon erected, and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party [fol. 470] of the first part of, in and to the same, and every part and parcel thereof, with the appurtenances, Also, all and singular the rights, privileges, franchises, authority and powers held, owned and possessed by the said part of the first part, as aforesaid, and also all and singular the lines of railroad now constructed or hereafter to be constructed on the streets and avenues described and set forth in its said certificate, and in the said Act of the Legislature of the State of New York, and on such other streets or avenues as the said party of the first part may at any time hereafter be permitted to use for that purpose, with all the franchises and rights, power, privilege, and authority which may hereafter be acquired by the said party of the first part, to use such other streets and avenues, and all rails, ties, stringers, chairs, and all structures and materials for structures, now appurtenant or belonging to the said railroad or which may be at any time hereafter to said Road appurtenant or belonging, by what name soever designated and all rolling stock, horses, harness, tools, implements, maps, surveys, profiles, and all other personal property of

whatever name or nature, now belonging to said party of the first part, or which may hereafter be acquired by it, or its successors, and also all real estate, Depot grounds, and grounds for storage now owned, or which may hereafter at any time be acquired by the party of the first part, and all shops and stables, and all other erections now owned or hereafter to be owned or constructed by the party of the first part on said real estate hereinbefore described, or upon any other real estate and all other property of every name and nature, real, personal, or mixed, which may hereafter be acquired by said party of the first part or its successors, and all other property rights, interests, privileges, franchises, authority and powers of what name or nature soever, now owned or which may hereafter be acquired by the said party of the first part."

Part of said mortgaged property acquired by said defendant Central Park, North and East River Railroad Company subsequently to the date of the said mortgage and now subject to the lien of said mortgage consists of the following parcels of real estate in the Borough of Manhattan, City, County and State of New York, to wit:

(a) The parcel of real estate conveyed to the said Central Park, North and East River Railroad Company by John A. Morrison, by deed dated March 10th, 1875, and recorded May 11th, 1875, in Liber 1323 of Conveyances of the Register's office for the County of New [fol. 471] York, page 466 et seq. and in the said deed described as follows:

"All those certain lots, pieces or parcels of ground, situate, lying and being in the 22nd Ward of the City of New York and bounded and described as follows: Beginning at a point on the south isde of 54th Street in said City distant 350 feet easterly from the southeast corner of the 11th Avenue and 54th Street; running thence easterly 25 feet along the southerly line of 54th Street; thence southerly parallel to 11th Avenue through the centre of the block to the line of property owned by Garrit H. Striker 162 feet 11½ inches; thence northwesterly along the line of said property 25 feet 3¼ inches; thence northerly parallel to 11th Avenue 159 feet and 6¾ inches to the place of beginning."

(b) The parcel of real estate conveyed to the said Central Park, North and East River Railroad Company by Jennie McDonald and John McDonald, her husband, by deed dated November 15th, 1881, and recorded November 26th, 1881 in Liber 1628 of Conveyances of the Register's Office for the County of New York, page 198 et seq., and in said deed described as follows:

"All that certain piece or parcel of land, lying and being in the 22nd Ward of the City of New York situated on the north side of 53rd Street between 10th and 11th Avenues and known as Lot No. 769 on a certain map of John Hopper estate filed in the Register's office of the City of New York, December 31, 1864, as Map No. 660, and being bounded and described as follows: Beginning at a point on the northerly side of 53rd Street distant 450 feet westerly from

the westerly side of Tenth Avenue and running thence westwardly along the northerly side of 53rd Street 25 feet; thence northwardly on a line parallel with Tenth Avenue 44 feet 10 inches; thence southeastwardly 25 feet or thereabouts to a point in a line distant 41 feet 4¼ inches northwardly from the north side of 53rd Street and thence southwardly on a line parallel with 10th Avenue 41 feet 4¼ inches to the northerly side of 53rd Street to the point or place of beginning.

(c) The parcel of real estate conveyed to the said Central Park, North and East River Railroad Company by Margerete Kampfner and August Kampfner, her husband, by deed dated October 27th, 1881, and recorded November 1st, 1881, in Liber 1621 of Conveyances, of The Register's Office for the County of New York, page 298 et seq., and in said deed described as follows:

[fol. 472] "All that certain lot, piece or parcel of land, lying and being in the 22nd Ward of the City of New York situated on the northerly side of 53rd Street distant 425 feet westwardly from the westerly side of 10th avenue, running thence westwardly along said northerly side of 53rd Street 25 feet; thence northwardly on a line parallel with 10th Avenue 41 feet 4¼ inches; thence southeastwardly 25 feet or thereabouts to a point in a line distant 37 feet 10½ inches northwardly from the northerly side of 53rd Street; and thence southwardly on a line parallel with 10th Avenue 37 feet 10½ inches to the northerly side of 53rd Street to the point or place of beginning."

(d) The parcel of real estate conveyed to the said Central Park, North and East River Railroad Company, by John Foersch and Theodora, his wife, by deed dated September 22nd, 1891, and recorded September 28th, 1891, in Liber 9 of Conveyances, Section 4, in the office of the Register of the County of New York, pages 67 et seq., and in said deed described as follows:

"Certain lots in the 22nd Ward of the City of New York bounded and described as follows; Beginning at a point on the southerly line of 54th Street distant 325 feet easterly from the southeasterly corner of 54th Street and 11th Avenue; running thence easterly 25 feet along the southerly line of 54th Street; thence southerly parallel to the 11th Avenue running thence easterly 25 feet along the southerly line of 54th Street; thence southerly parallel to the 11th Avenue through the centre of the block to the line of property owned by Garret H. Striker 159 feet, 6¾ inches; thence northwesterly along the line of said property 25 feet and 3¼ inches; thence northerly parallel to 11th Avenue 156 feet to the point or place of beginning."

III. That the lien of the said mortgage dated December 1st, 1872, upon the foregoing property is prior and superior to any other lien in favor of any party to this cause; that default has been made upon said mortgage entitling the complainant to a sale of the mortgaged

premiess property and franchises; and that the amount due for principal and interest upon the bonds secured by the said mortgage lien is one million, three hundred and ninety-one thousand, eight [fol. 473] hundred dollars ($1,391,800), such sum being made up as follows, to wit:

(1) The amount of One million two hundred thousand dollars ($1,200,000) for the principal of said bonds:

(2) The amount of one hundred and ninety-one thousand eight hundred dollars for interest upon the said principal sum at the rate of six per centum per annum from the 17th day of June, 1908, to the date of this decree.

IV. That the mortgaged property, premises and franchises above described are so situated that they cannot be sold except as an entirety, due regard being had to the best interests of those interested in the same.

V. It was further ordered, adjudged and decreed that the defendant Central Park, North and East River Railroad Company pay, or cause to be paid, within ninety days after the entry of this decree, to the complainant, The Farmers' Loan and Trust Company, as Trustee, for the use and benefit of the holders of the said bonds secured by the said mortgage dated December 1st, 1872, (a) the sum hereinbefore found due upon said bonds, together with interest thereon at the rate of six per centum per annum from the date of this decree, and (b) a sufficient sum of money to pay the costs of complainant in this case as they shall be taxed, and its compensation as Trustee under the said mortgage with its counsel fees and other expenses and disbursements as the same may be fixed by this Court, and sufficient to pay all other sums, if any, which may be allowed by this Court on account of allowances to the parties in this cause and their solicitors and counsel. In case the said sums shall be paid as herein described, then any party hereto may apply to this court for such further relief and for such further directions as may be just and equitable.

[fol. 474] VI. It was further ordered, adjudged, and decreed that in default of payment of the said sums as aforesaid by the defendant Central Park, North and East River Railroad Company or by any one claiming under it or for its account, or by the other parties defendant or some of them, the said mortgage dated December 1st, 1872, shall be foreclosed and the said mortgaged premises, property and franchises shall be sold as hereinafter directed, and all the right, title, estate and equity of redemption of the defendant Central Park North and East River Railroad Company and of each and all of the parties hereto, and of all persons claiming or to claim under them, or either of them, of in, or to the said premises, property and franchises and every part and parcel thereof shall be forever barred and foreclosed, and that said sale shall be made upon the terms and in the manner following, to wit:

The said premises and property, real, personal and mixed rights, privileges, muniments and franchises, wheresoever situated, shall be sold as an entirety, and without valuation, appraisement, redemption or extension at public auction to the highest bidder therefor, at twelve o'clock noon, at the north main entrance of the County Court House of the County of New York in the City of New York, in the State of New York, on a day to be named by the Master Commissioner herein appointed in his notice of sale; that before making said sale the said Master Commissioner shall publish a notice thereof once a week for at least four weeks prior to such sale in one newspaper, printed, regularly issued and having a general circulation in the said City of New York, County of New York, the particular newspaper to be selected by the Master Commissioner herein appointed; and further that the Master Commissioner, personally, or by some person to be designated by him to act in his name and by his authority, may adjourn the sale from time to time [fol. 475] without further advertisement, except a brief notice of the adjourned day, but only on the request of the said complainant, or its solicitors or by orders of the Court or a Judge thereof.

The said premises and property shall be sold subject to all taxes and assessments and liens prior to the lien of said mortgage to the complainant existing in favor of any person or persons, corporation or corporations, not a party to this cause; but the purchaser at such sale, his successors and assigns, shall have the right to contest any claim for which priority of lien over the lien of said mortgage upon said premises and property shall be asserted.

The Master Commissioner shall receive no bid from any person until such person shall have deposited with him the sum of Fifty thousand dollars; such deposit shall be returned in case the depositor's bid be not accepted; but if his bid be accepted, then such deposit shall be held by such Master Commissioner on account of the purchase price.

The purchaser, when the property is struck down to him, and his bid approved by the Court, shall at once pay the Master Commissioner, on account of his purchase, a sufficient sum to make up with his deposit ten per centum of his accepted bid. The deposit required before bidding shall be paid in United States currency, or in such certified draft, certificate or cheque as may be satisfactory to the Master Commissioner. Said further payment shall be made either as aforesaid or in the bonds secured by the said mortgage dated December 1st, 1872, taken at a valuation equal to the amount said bonds would be entitled to receive in cash out of the amount bid for the said property. The certificate of the said The Farmers' Loan and Trust Company that it holds bonds as therein described subject to the order of the party named therein, such certificate being by such party transferred to the order of said Master Commissioner, shall be accepted in lieu of such bonds. Should said further [fol. 476] payment not be made, the property shall be forthwith resold with such further advertisement as the Court may direct, the Court reserving the right to consider such resale made on account

of such successful bidder at such prior sale or as an original sale; and in case of such resale, the deposit received from the said successful bidder shall be applied on account of the purchase price. Such further portions of the purchase price shall be paid in money as the Court may from time to time direct, the Court reserving the right to resell the premises and property herein directed to be sold upon the failure of the purchaser, his successors or assigns to comply with any order of the Court in that regard, and in case of any such resale, or the failure of the said purchaser, his successors or assigns to comply with the terms of the bid, or the orders of the Court relative to such additional payment, the said money and bonds so paid in as aforesaid shall be forfeited as liquidated damages, and shall be applied towards the expenses of any resale ordered, or towards making good any deficiency or loss in case the property at such resale shall bring less than at the prior sale. The balance of the purchase price may be paid either in money or in bonds secured by the said mortgage dated December 1st, 1872, each said bond being received for such sum as the holder thereof would be entitled to receive under the distribution herein ordered.

The certificate of the said The Farmers' Loan and Trust Company that it holds bonds as therein described subject to the order of the party named therein, said certificate being by such party transferred to the order of said Master Commissioner, shall be accepted in lieu of such bonds.

Any party to this cause and any holder or holders of any of the bonds so secured by the lien of said mortgage dated December 1st, 1872, as aforesaid, may bid and purchase at such sale.

[fol. 477] It was further ordered that Isham Henderson, Esq., of New York, State of New York, be and he hereby is, designated and appointed a Master Commissioner to make the sale hereby ordered and decreed and to execute and deliver a deed of conveyance and bill of sale of the property so to be sold to the purchaser thereof upon the confirmation of such sale and completion of the payment of the entire bid as herein provided; the Court, however, reserving the right in term time or in Chambers to appoint another person such Master Commissioner, with like powers, in case of the death or disability to act of the Master Commissioner hereby designated, or in case of his resignation or failure to act or removal by the Court.

It was further ordered and decreed that within thirty days from the confirmation of said sale, or such further time as the Court may allow on application of the purchaser for good cause shown, the purchaser, his successors and assigns shall complete payment of the entire amount bid to the said Master Commisioner; and that on such payment the said purchaser, his successors and assigns shall be entitled to receive a deed of conveyance and bill of sale of the property purchased, from the Master Commissioner, and from the other parties to this cause as herein provided, and to receive possession of the property so purchased from the parties holding possession of the same.

It was further ordered and decreed that the fund arising from such sale shall be deposited by said Master Commissioner in The Farmers'

Loan and Trust Company, and shall be paid out and applied only upon orders of the Court herein, as follows:

[fol. 478] First. To and for the payment of all proper expenses attendant upon said sale, including the expenses, outlays and compensations of the Master Commissioner to make said sale, as such expenses, outlays and compensation may be hereafter fixed and allowed.

Second. To and for the payment of the costs of this suit and the compensation of the complainant herein for its services, charges and expenses in the execution of its trust under its said mortgage dated Decmeber 1st, 1872 including its own compensation and commissions, and its disbursements for solicitors' and counsel fees in the execution of said trust, as such charges, expenses and compensation may be hereafter fixed and allowed by this Court, and also to and for the payment of such other proper allowance, compensation and disbursements to the parties and their counsel to this cause as the Court shall order.

Third. To and for the payment of the bonds of the Defendant Central Park, North and East River Railroad Company secured by the said mortgage dated December 1st, 1872, with interest thereon to the amount hereinbefore specified, together with interest thereon at the rate of six per centum per annum to the date of payment; or, if such fund be not sufficient to pay the same in full then to the payment of the same pro rata; that each of the said bonds presented to the Master Commissioner shall, if the holder thereof shall so request, be stamped or endorsed in some way by said Master Commissioner so as to show the amount that has been paid on account of the same and be returned so stamped or endorsed to the holder thereof; that in case [fol. 478½] of payment in full of said bonds with interest thereon, the same shall be delivered with "Payment in Full" stamped thereon by the Master Commissioner to the purchaser at the sale to be held as a muniment of title; and

Fourth. If, after making all the above payments, there shall be any surplus, the same shall be paid according to the further order of court in that regard.

And further, that in case there shall be any deficiency in the amount required to be paid in full of the several amounts directed and allowed to be paid, then the said Master Commissioner shall report to the Court the amount of the deficiency, and the complainant, as Trustee, shall have judgment against the said defendant Central Park, North and East River Railroad Company for the amount due and shall have execution therefor pursuant to the rules and practice of this Court; and

It was further ordered and decreed that the defendant, Central Park, North and East River Railroad Company and the complainant, The Farmers' Loan and Trust Company, be and they hereby are directed to execute and deliver, but under the direction of the Master Commissioner, conveyances executed by them respectively by way

of confirmation and further assurance of title to the said purchaser, his successors or assigns, of all and singular the mortgaged property and premises and every part and parcel thereof of every kind and [fol. 479] description wherever situated hereby directed to be sold by the Master Commissioner; and that the form of said conveyance and mode of execution thereof shall be settled and approved by the Master Commissioner, or by the Court or a Judge thereof, if any question shall arise with reference thereto; and that in default of such conveyance or conveyances, this decree shall operate as such.

It was further ordered, adjudged and decreed that the purchaser at any such sale, his successors and assigns, shall be allowed one year from the date of confirmation within which to elect, or adopt or continue in force or to refuse to adopt any lease, traffic or trackage or operating agreement or other executory contract which may be included in the property sold or may constitute an incident or appurtenance thereof. Such election shall be made by an instrument in writing subscribed by such purchaser, his successors or assigns, and filed in the office of the Clerk of this Court, and no conduct or user of rights by any such purchaser, his successors or assigns, within such period of one year unaccompanied by the filing of such written instrument, shall be deemed to conclude the purchaser, his successors or assigns in respect of such election. In the event of the failure by such purchaser, his successors or assigns, to file a statement of election to refuse to adopt any such contract, lease or agreement within the period of one year above allowed, he or they shall be deemed to have elected to adopt such contract, lease or agreement and to accept the same as part of the property purchased. In the event that such purchaser, his successors or assigns, shall elect not to adopt any such lease, contract or agreement, he or they shall reassign and retransfer all his or their right, title and interest in the same to the Central Park, North and East River Railroad Company without deductions however from the sum paid or [fol. 479½] payable by said purchaser on account of his purchase thereof.

It was further ordered, adjudged and decreed that all questions not hereby disposed of are hereby reserved for future adjudication, and the Court reserves jurisdiction of this cause and of the property affected by this decree for the purpose of finally disposing of all such questions and matters; and any party to this cause may apply to the Court for further orders and directions at the foot of this decree. The April, 1910, Equity Term of this Court is extended until after the complete execution of the provisions of this decree and until after the final disposition of all matters therein reserved for future determination or action by this Court.

Dated, New York, February 16th, 1911.

E. Henry Lacombe, United States Circuit Judge.

[fol. 480] EXHIBIT D

This indenture, made this 21st day of January, in the year One thousand nine hundred and thirteen, between Edward Cornell and Esther B. Cornell, his wife, of Central Valley, New York, parties of the first part, and Belt Line Railway Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal office at Number 789 Tenth Avenue, in the Borough of Manhattan, City of New York, party of the second part.

Whereas, pursuant to the terms of a certain sale in foreclosure, held November 14th, 1912, and in compliance with the decree under which said sale was held, being the decree entered in the United States Circuit Court for the Southern District of New York on February 16th, 1911, in the suit of The Farmers' Loan and Trust Company, Trustee, against Central Park, North and East River Railroad Company and others, Isham Henderson, as Master Commissioner, and the said The Farmers' Loan and Trust Company, trustee, by deed bearing date the 19th day of December, 1912, duly conveyed the property sold at said sale to the said Edward Cornell; and said deed was duly recorded in the office of the Register of the County of New York on the 21st day of December, 1912, at eleven o'clock and fifty-seven minutes in the forenoon, as follows: In Block Series (Conveyances), Section 1, Liber 141, page 455; Section 2, Liber 219, page 400; Section 3, Liber 181, page 138; Section 4, Liber 154, page 174, and Section 5, Liber 180, page 67, and

[fol. 481] Whereas, pursuant to the terms of said sale and of said decree, said Central Park, North and East River Railroad Company, by deed bearing date the said 19th day of December, 1912, duly conveyed the property so sold to the said Edward Cornell, and said deed was duly recorded in the office of the Register of the County of New York on the 21st day of December, 1912, at eleven o'clock, fifty-nine minutes in the forenoon, as follows: In Block Series (Conveyances), Section 1, Liber 141, page 461; Section 2, Liber 220, page 9; Section 3, Liber 179, page 261; Section 4, Liber 153, page 220; Section 5, Liber 176, page 116.

Now, therefore, this indenture witnesseth:

That the said parties of the first part, for and in consideration of the sum of one Dollar, lawful money of the United States of America to them in hand duly paid, do hereby grant, bargain, sell and release unto the said party of the second part, and to its successors and assigns all and singular the premises and property, real, personal and mixed, rights, privileges, muniments and franchises so sold as aforesaid and which were covered by or embraced in the aforesaid deeds, the said premises, property, rights, privileges, muniments and franchises being described in the said deeds as follows:

"All and singular the premises and property, real, personal and mixed, rights, privileges, muniments and franchises so sold as aforesaid, and covered by or embraced in the said mortgage of said Central Park, North and East River Railroad Company dated December 1st,

1872, and in and by said decree of February 16th, 1911, directed to be sold as aforesaid, the said premises and property, rights, privileges, muniments and franchises, being in said mortgage and in said decree and in the notice of said sale described as follows (the words "party of the first part" in said description referring to the said Central Park, North and East River Railroad Company, and the Act of the Legislature of the State of New York mentioned in said description being the Act entitled 'An Act to Authorize the Construction of a [fol. 482] Railroad on South, West and certain other streets in the City of New York,' passed April 17th, 1860; and the Certificate mentioned in said description, being the Certificate of Incorporation of said Central Park, North and East River Railroad Company filed in the office of the Secretary of State of the State of New York on or about the 19th day of July, 1860);

"All those thirty-four certain lots, pieces or parcels of land, situate, lying and being in the Twenty-second Ward of the City of New York, which taken together are bounded and described as follows, namely; Beginning at the southwesterly corner of Fifty-fourth street and Tenth avenue; thence running westerly along the southerly side of Fifty-fourth street, Four hundred and twenty-five feet; thence southerly and parallel with Tenth Avenue, two hundred feet ten inches to the northerly line of Fifty-third street; thence easterly along the said northerly line of Fifty-third street, Four hundred and twenty-five feet to the southwesterly corner of Fifty-third street and Tenth avenue; and thence northerly along the westerly line of Tenth avenue, two hundred feet ten inches to the place of beginning:

Together with the Depot Buildings thereon erected, and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in and to the same and every part and parcel thereof, with the appurtenances. Also, all and singular the rights, privileges, franchises, authority and powers held, owned and possessed by the said party of the first part, as aforesaid, and also all and singular the lines of railroad now constructed or hereafter to be constructed on the streets and avenues described and set forth in its said certificate, and in the said Act of the Legislature of the State of New York, and on such other streets or avenues as the said party of the first part may at any time hereafter be permitted to use for that purpose; with all the franchises and rights, power, privilege and authority which may hereafter be acquired by the said party of the first part, to use such other streets and avenues, and all rails, ties, stringers, chairs, and all structures and materials for structures, now appurtenant or belonging to the said railroad, or which may be, at any time hereafter to said Road appurtenant or belonging, by what name soever designated, and all rolling stock, horses, harness, tools, implements, maps surveys, profiles, and all other personal property of whatever name or nature, now belonging to said party of the first

part, or which may hereafter be acquired by it, or its successors, and also all real estate, Depot grounds, and grounds for storage now owned, or which may hereafter at any time be acquired by the party of the first part, and all shops and stables, and all other erections now owned or hereafter to be owned or constructed by the party of the first part on said real estate hereinbefore described, or upon any other real estate, and all other property of every name and nature, real, personal or mixed, which may hereafter be acquired by said party of the first part or its successors, and all other property rights, interests, privileges, franchises, authority and powers of what name [fol. 483] or nature soever, now owned or which may hereafter be acquired by the said party of the first part."

Including the following parcels of real estate acquired by the said Central Park, North and East River Railroad Company subsequently to the date of the said mortgage and now subject to the lien of said mortgage, all of said parcels being situated in the Borough of Manhattan, City, County and State of New York:

"(a) The parcel of real estate conveyed to the said Central Park, North and East River Railroad Company, by John A. Morrison, by deed dated March 10th, 1875, and recorded May 11th, 1875, in Liber 1323 of Conveyances of the Register's office for the County of New York, page 466 at seq. and in the said deed described as follows: 'All those certain lots, pieces or parcels of ground, situate, lying and being in the 22d Ward of the City of New York and bounded and described as follows: Beginning at a point on the south side of 54th Street in said City distant 350 feet easterly from the southeast corner of the 11th Avenue and 54th Street, running thence easterly 25 feet along the southerly line of 54th Street; thence southerly parallel to 11th Avenue through the center of the block to the line of property owned by Garrit H. Striker 162 feet 11½ inches; thence northwesterly along the line of said property 25 feet 3¼ inches; thence northerly parallel to 11th Avenue 159 feet and 6¾ inches to the place of beginning.'

"(b) The parcel of real estate conveyed to the said Central Park, North and East River Railroad Company by Jennie McDonald and John McDonald, her husband, by deed dated November 15th, 1881, and recorded November 26th, 1881, in Liber 1628 of Conveyances of the Register's office for the County of New York, page 198 et seq., and in said deed described as follows: 'All that certain piece or parcel of land, lying and being in the 22nd Ward of the City of New York situated on the North side of 53rd Street between 10th and 11th Avenues and known as Lot No. 7 9 on a certain map of John Hopper estate filed in the Register's office of the City of New York, December 31, 1864, as Map No. 660, and being bounded and described as follows: Beginning at *at* a point on the northerly side of 53rd Street distant 450 feet westerly from the westerly side of Tenth Avenue and running thence westwardly along the northerly side of 53rd Street 25 feet; thence northwardly on a line parallel with Tenth Avenue 44 feet 10 inches; thence southwestwardly 25 feet or thereabouts to a

point in a line distant 41 feet 4¼ inches northwardly from the north side of 53rd Street and thence southwardly on a line parallel with 10th Avenue 41 feet 4¼ inches to the northerly side of 53rd Street to the point or place of beginning.'

"(c) The parcel of real estate conveyed to the said Central Park, North and East River Railroad Company by Margarete Kampfner and August Kampfner, her husband, by deed dated October 27th, 1881, and recorded November 1st, 1881, in Liber 1621 of Conveyances, of the Register's office for the County of New York, page 298 et seq., and in said deed described as follows: 'All that certain lot, piece or parcel of land, lying and being in the 22nd Ward of the City of New York situated on the northerly side of 53rd Street distant 425 feet westwardly from the westerly side of 10th Avenue; [fol. 484] running thence westwardly along said northerly side of 53rd Street 25 feet; thence northwardly on a line parallel with 10th Avenue 41 feet 4¼ inches; thence southeastwardly 25 feet or thereabouts to a point in a line distant 37 feet 10½ inches northwardly from the northerly side of 53rd Street; and thence southwardly on a line parallel with 10th Avenue 37 feet 10½ inches to the northerly side of 53rd Street to the point or place of beginning.'

"(d) The parcel of real estate conveyed to the said Central Park, North and East River Railroad Company, by John Foersch and Theodora his wife, by deed dated September 22nd, 1891, and recorded September 28th, 1891, in Liber 9 of Conveyances, Section 4, in the office of the Register of the County of New York; pages 67 et seq., and in said deed described as follows: 'Certain lots in the 22nd Ward of the City of New York bounded and described as follows: Beginning at a point on the southerly line of 54th Street distant 325 feet easterly from the southeasterly corner of 54th Street and 11th Avenue; running thence easterly 25 feet along the southerly line of 54th Street, thence Southerly parallel to the 11th Avenue through the center of the Block to the line of property owned by Garret H. Striker 159 Feet 6¾ inches; thence northwesterly along the line of said property 25 feet and 3¼ inches; thence northerly parallel to 11th Avenue 156 feet to the point or place of beginning.'"

Together with the appurtenances and all the estate and rights of the said parties of the first part in and to the said premises:

To have and to hold all and singular the above granted premises, property, rights, privileges, muniments and franchises hereinabove mentioned and described and hereby granted, or intended so to be, unto the said party of the second part, its successors and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Edward Cornell. (L. S.) Esther H. Cornell. (L. S.)

Sealed and delivered in presence of Warner B. Matteson.

[fol. 485] STATE OF NEW YORK,
County of Kings, ss:

On this 21st day of January in the year One thousand and nine hundred and thirteen, before me personally appeared Edward Cornell and Esther H. Cornell, his wife, to me personally known, and known to me to be the individuals described and who executed the foregoing instrument, and they severally duly acknowledged to me that they executed the same for the purposes therein mentioned.

Warner B. Matteson, Notary Public, Kings County. Certificate filed in New York County. Co. Clerk's Certificate Kings Co. No. 157. Register's Certificate Kings Co. No. 3522. Co. Clerk's Certificate N. Y. Co. No. 3102. Register's Certificate N. Y. Co. No. 35. (Seal.)

STATE OF NEW YORK,
County of Kings, ss:

I, Charles S. Devoy, Clerk of the County of Kings, and also Clerk of the Supreme Court of said County (said Court being a Court of Record) do hereby certify that Mr. Warner B. Matteson, whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public of the State of New York in and for said County of Kings, dwelling in said County, commissioned and sworn and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to said Certificate is genuine, and that the said instrument is executed and acknowledged according to the laws of the State of New York.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said County and Court, this 21 day of March, 1913.

Chas. S. Devoy, Clerk. (Seal.)

[fol. 486] EXHIBIT E

Resolution or Franchise from the Board of Aldermen of the City of New York to the Central Park, North and East River Railroad Company, Dated December 28, 1861

Resolved, that the permission of the Mayor, Aldermen and Commonalty of the City of New York by the Common Council duly convened, is hereby given unto the "Central Park, North and East River Railroad Company" assigns, under the act entitled "an act to authorize the construction of a railroad track on South, West, and certain other streets in the City of New York" passed Aprile 17, 1860, and their assigns, to lay, construct, maintain, operate, and use a railroad, with a double or single track, as hereinafter provided

and to convey passengers and freight thereon for compensation, through, upon, and along the following streets and avenues, route or routes in the City of New York, viz: To commence at the intersection of Tenth Avenue and Fifty-ninth Street: thence through, and along Tenth Avenue, with a double track into West Twelfth Street; thence through and along West Twelfth Street, with a single track to Greenwich Street; thence from West Twelfth Street through and along both West and Greenwich Streets, southerly, with a single or double track upon each of said streets, to Battery Place; thence through and along Battery Place to State Street, with a double track thence through and along State Street, with single track, to Whitehall Street; thence through and along Whitehall Street with double track, to South Ferry; returning through and along Whitehall Street, with a single track, from its intersection with State Street, [fol. 487] to Bowling Green; thence along southerly side of Bowling Green, with single track to connect with the double track in Battery Place, with the right to construct, maintain and use a double track from West Street through and along Chambers Street to its intersection with Hudson Street, also from the intersection of Tenth Avenue and Fifty-ninth Street, with double track, through and along Fifty-ninth Street to First Avenue, thence through and along First Avenue, with double track to Twenty-third Street; thence through and along Twenty-third Street, with double track, to Avenue A; thence through and along Avenue A, with double track, to Fourteenth Street; thence through and along Fourteenth Street, with double track to Avenue D; thence through and along Avenue D, with double track, to Houston Street; thence through and along Houston Street, with double track, to Mangin Street; thence through and along Mangin Street, with single track to Grand Street; thence through and along Grand Street to Corlears Street, with single track; thence through Corlears Street to South Street, with single track; thence through and along South Street to Montgomery Street, with single track; thence through and along Montgomery Street; thence through and along South Street, with double track, to the junction of South and Front Streets, at Roosevelt Street; thence through and along South Street to Old Slip, with single track thence through and along Old Slip to Water Street, with single track; thence through and along Water Street to Whitehall Street, with single track, thence through and along Whitehall Street to South Street, with double track; thence through and along South Street to Coenties Slip, with [fol. 488] single track; thence through and along Coenties Slip to Front Street, with single track and also with single track from Old Slip through and along Front Street to Whitehall Street; also a double track in Broad Street, from Water Street to South Street; also through and along Houston Street, from its intersection with Avenue D, by the track already named, to Goerck Street; thence through and along Goerck Street to Grand Street, with single track; thence through and along Grand Street, with single track to its intersection with Monroe Street; thence through and along Monroe Street to Jackson Street, with single track; thence through and along Jackson Street to Front Street, with single track; thence through

and along Front Street, with single track, to its intersection with South Street at Montgomery Street; thence through and along South Street, by the double track already named, to Front Street, at the junction of South and Front Streets at Roosevelt Street; thence through and along Front Street to Old Slip, and thence through and along Front Street to Whitehall Street by the track already named; thence through and along Whitehall Street, with single track, to South Ferry—with the privilege of laying all necessary sidings, turn-outs, connections and switches, for the proper working and accommodation of the said railroad in any of the above-mentioned streets, and of connecting with, running on, or crossing all such other railroad tracks as may lie along or across any of said routes, streets, or avenues.

And in respect to said rails, track, railroad and route, authority, permission and license of franchise are hereby given to said railroad company to take up and replace so much of the pavement or pave- [fol. 489] ments of said streets and avenues, or any of them as may be necessary for the said purpose, or to further the said permission and also to occupy and use the said streets or avenues or any of them, or portions thereof, and so much of the property of the Mayor, Aldermen and Commonalty, bordering on and adjoining said route, or portions thereof, as may be needful to perfect and carry out and insure the authority and permission hereby aforesaid given; said work to be done under the supervision and direction of the Superintendent of Street improvements.

Said railroad shall be constructed upon the most approved plan for the construction of city railroads, and the cars on the same shall run as often as the convenience of the public shall require and shall be subject to all the provisions of Chapter 41 of the Corporation Revised Ordinances approved June 20, 1859.

And no higher rate of fare shall be charged for the conveyance of passengers thereon than is now charged by the city railroads in said city now chartered and constructed.

In the construction, operation and use of such railroad, should the said parties above named or their assigns, deem it necessary or proper to run upon, intersect or use any portion of any other railroad tracks now laid upon any of the streets or avenues above named, they are hereby permitted to run upon, intersect, and use the same. And in all cases the use of said streets and avenues hereinbefore mentioned, for the purpose of said railroad as herein authorized, shall be considered one of the uses for which the Mayor, Aldermen [fol. 490] and Commonalty of said city hold said streets and avenues.

Adopted by Board of Councilmen, December 28, 1861.

Adopted by Board of Alderman, December 28, 1861.

Approved by the Mayor, December 31, 1861.

(Certificate of City Clerk omitted.)

[fol. 491] EXHIBIT F

Certificate of Incorporation of Belt Line Railway Corporation

Whereas, the property and franchises of the Central Park, North and East River Railroad Company, a domestic stock corporation, were sold on November 14, 1912, pursuant to the judgment and decree of the Circuit Court of the United States for the Southern District of New York, the same being a court of competent jurisdiction, to Edward Cornell, and said sale having been duly confirmed by said court, the said property and franchises were, in pursuance of said decree and the orders of said court made thereon, conveyed by deed dated December 19, 1912, to the said Edward Cornell, who has thereby acquired title to the said property and franchises in the manner prescribed by law; and

Whereas, the said purchaser, Edward Cornell, has associated with himself the following named persons, namely: A. Chalmers Charles, Alfred W. Haywood, Jr., Harold Harper, Henry M. Haviland, Walter Haviland, Harold R. Medina, Andrew Macrery, Warner B. Matteson, Amos J. Peaslee, John B. Summerfield, Louis F. Schwartz, Jr., Bertram Winthrop, Henry C. Field, Edward C. Ferr and Henry L. Terhune, all of whom are citizens of the United States and a majority of whom are residents of the State of New York, and the said purchaser and his associates desire to become a corporation, pursuant to the laws of the State of New York, and as such to take and possess the property and franchises thus sold and which at the time of sale possessed by the said Central Park, North and East River [fol. 492] Railroad Company, except such leases and contracts, sold with said property, as the new corporation, formed hereunder by said purchaser and his associates, shall hereafter lawfully elect not to assume.

Now, therefore, in conformity with the provisions of the laws of the State of New York in such case made and provided, we, the undersigned, Edward Cornell, A. Chalmers Charles, Alfred W. Haywood, Jr., Harold Harper, Henry M. Haviland, Walter Haviland, Harold R. Medina, Andrew Macrery, Warner B. Matteson, Amos J. Peaslee, John B. Summerfield, Louis F. Schwartz, Jr., Bertram Winthrop, Henry C. Field, Edward C. Kerr and Henry L. Terhune, being the said purchaser and his associates, do hereby certify:

First. The name of the corporation whose property and franchises we have required as aforesaid, is the Central Park, North and East River Railroad Company and said corporation organized under a certain Act of the Legislature of the State of New York; entitled "An Act to Authorize the formation of Railroad Corporations, and to regulate the same, "being Chapter 140 of the Laws of 1850, and the Acts amendatory thereof and supplemental thereto.

Second. The sale aforesaid was made by authority of the Circuit Court of the United States for the Southern District of New York, under and pursuant to a decree authorizing and directing the same,

which decree was made and entered in said court on the 16th day of February, 1911, in a certain cause pending in said court, entitled "The Farmers' Loan & Trust Company, Trustee, Complainant, against Central Park, North and East River Railroad Company and others, Defendants."

[fol. 493] Third. The following is a brief description of the property sold at said sale:

(1) A street railroad authorized by Chapter 51 of the Laws of 1860, entitled "An Act to authorize the construction of a railroad on Southwest, and certain other streets in the City of New York," extending from a point in Whitehall Street, near South Ferry, in the Borough of Manhattan, City of New York, through various streets and avenues in said Act specified, on the easterly side of Manhattan Island, to Fifty-ninth Street; then crossing Fifty-ninth Street to Tenth Avenue and south through various streets and avenues in said Act specified, on the westerly side of said Island to a point in Whitehall Street, near South Ferry, with the cars, horses, harness and equipment of said railroad, and also all other railroads and railroad routes, rights, privileges and franchises belonging to the Central Park, North and East River Railroad Company on the 1st day of December, 1872, or thereafter acquired by it.

(2) The carhouse property of said Company and the yards and lands adjacent thereto on the block bounded by Tenth Avenue, Fifty-third Street, Eleventh Avenue and Fifty-fourth Street, and all the cars, tools, implements, materials and supplies, contracts, contract rights and property of every name and nature, real, personal or mixed, owned by the Central Park, North and East River Railroad Company on December 1st, 1872, or thereafter acquired by it.

Fourth. The name of the new corporation intended to be formed by the filing of this Certificate, is Belt Line Railway Corporation; and its principal office is to be located in the borough of Manhattan, City and County of New York.

[fol. 494] Fifth. The maximum amount of the capital stock of such new corporation shall be Two Hundred Thousand Dollars ($200,000) divided into Two Thousand ($2,000) shares of One Hundred Dollars, ($100.) each, all said shares to be of one class.

Sixth. The affairs of the new corporation shall be managed by thirteen (13) directors. The names and post office address of the directors for the first year are as follows:

(Names omitted.)

Seventh. The corporation shall acquire title to the property mentioned in Article Third hereof (excepting such leases and contracts, sold with said property, as said corporation shall hereafter elect not to assume), and shall assume all contracts and obligations made or incurred by said Edward Cornell in operating or in connection with said property pending the complete acquisition by said corporation

of title thereto, by contract with Edward Cornell, the said purchaser, and shall issue to him, or upon his order, in pursuance of such contract, its stock, bonds and other evidences of indebtedness to such amount as may be agreed on, but not in excess of the amount to which such stock, bonds and evidences of indebtedness may be lawfully issued; and pending the complete acquisition of title, the corporation shall take and possess said property in accordance with the terms of such lease or other contract as may be agreed upon with said purchaser.

Eighth. The corporation may purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any [fol. 495] corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations to the extent that may be lawful.

The directors of the corporation may designate from their number an Executive Committee, which shall, for the time being in the intervals between its meetings and to the extent provided by the By-Laws, exercise the power of the Board of Directors, so far as they may lawfully do so, in the management of the affairs and business of the corporation. The directors of the corporation need not be stockholders therein.

The Board of Directors shall from time to time decide whether and to what extent and at what time and under what conditions and requirements the accounts and books of the corporation, or any of them, except the stock-book, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any books or documents of the corporation except as conferred by the laws of the State of New York, or authorized by the Board of Directors.

In witness whereof, We, the undersigned, being the said purchaser and his associates, have hereunto severally subscribed our names, at the City of New York, this 21st day of December, 1912.

(Names omitted.)

(Acknowledgements omitted.)

[fol. 496] State of New York,
County of New York, ss:

I, William F. Schneider, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, that I have compared the preceding with the original certificates of Incorporation of Belt Line Railway Corporation on file in my office and that the same is a correct transcript therefrom, and of the whole of such original. Indorsed Filed & Recorded Dec. 24th, 1912. 2h 52 M.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 26th day of Dec. 1912.

Wm. F. Schneider, Clerk.

STATE OF NEW YORK, ss:

Office of the Secretary of State

I have compared the preceding with the original Certificate of Reorganization of the Belt Line Railway Corporation, filed and recorded in this office on the 24th day of December, 1912, and do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany, this twenty-fourth day of December, one thousand nine hundred and twelve.

Jose E. Didgeon, Second Deputy Secretary of State. (Seal.)

[fol. 497] EXHIBIT G

Certificate of Incorporation of the Central Park, North and East River Railroad Company

These articles of association, made and entered into at the City of New York, this fifth day of June, in the year of Our Lord One Thousand eight hundred and sixty,

Witness, that the persons whose names are subscribed hereto hereby associate themselves together and form a company by the name of "The Central Park, North and East River Railroad Company," for the purpose of constructing, maintaining and operating a railroad with a single or double track, as hereinafter specified, for public use in the conveyance of persons and property through the City and County of New York, commencing at the intersection of Tenth Avenue and Fifth-ninth Street; thence through and along Tenth Avenue, with a double track, into West Twelfth Street; thence through and along West Twelfth Street, with a single track to Greenwich Street; thence from West Twelfth Street through and along both West and Greenwich Streets, southerly with a single or double track upon each of said streets, to Battery Place; thence through and along Battery Place to State Street, with double track; thence through and along State Street, with single track to Whitehall Street; thence through and along Whitehall Street with double track to South Ferry, returning through and along Whitehall Street with single track, from its intersection with State Street to Bowling Green; thence along southerly side of Bowling Green, with single [fol. 498] track, to connect with the double track in Battery Place, with the right to construct, maintain and use a double track from West Street through and along Chambers Street, to its intersection with Hudson Street, also from the intersection of Tenth Avenue and Fifty-ninth Street with double track through and along Fifty-ninth

Street to First Avenue; thence through and along First Avenue with double track, to Twenty-third Street; thence through and along Twenty-third Street, with double track to Avenue A; thence through and along Avenue A with double track to Fourteenth Street; thence through and along Fourteenth Street; with double track to Avenue D; thence through and along Avenue D, with double track, to Houston Street; thence through and along Houston Street, with double track to Mangin Street; thence through and along Mangin Street, with single *Street* to Grand Street; thence through and along Grand Street to Corlears Street, with single track; thence thru and along Corlears Street to South Street, with single track; thence through and along South Street to Montgomery Street, with single track; thence through and along Montgomery Street, with single track, to the junction of Front and South Streets; thence through and along South Street, with double track, to the junction of South and Front Streets at Roosevelt Street; thence through and along South Street to Old Slip, with single track; thence through and along Old Slip to Water Street, with single track; thence through and along Water Street to Whitehall Street, with single track; thence through and along Whitehall Street to South Street with double track, thence through and along South Street to Coenties Slip with single track; thence through and along Coenties Slip to [fol. 499] Front Street, with single track, and also with single track from Old Slip through and along Front Street to Whitehall Street; also a double track in Broad Street from Water Street to South Street, also through and along Houston Street from its intersection with Avenue D. by the track already named, to Goerck Street; thence through and along Goerck Street to Grand Street, with single track; thence through and along Grand Street, with single track, to its intersection with Monroe Street; thence through and along Monroe Street to Jackson Street, with single track, thence through and along Jackson Street to Front Street, with a single track; thence through and along Front Street, with a single track to its intersection with South Street at Montgomery Street, thence through and along South Street by the double track already named to Front Street, at the junction of South and Front Streets at Roosevelt Street; thence through and along Front Street to Old Slip, and thence through and along Front Street to Whitehall Street, by the track already named, thence through and along Whitehall street, with single track, to South Ferry, with the privilege of laying all necessary sidings, turnouts, connections and switches for the proper working and accommodation of the said railroad in any of the above mentioned streets, and of connecting with, running on, or crossing all such other railroad tracks as may lie along or across any of said routes, streets or avenues. The said road to be constructed, maintained and operated from the said intersection of Tenth Avenue and Fifth-ninth Street by the route aforesaid to the South Ferry; the entire length of the line of said road from its starting point to its termination, [fol. 500] being about seventeen miles, part of said distance being covered by a single track and part by a double track; the entire length of track, both single and double, being about thirty miles.

That the said company is to continue for one hundred years.

That the amount of its capital stock is one million two hundred and fifty thousand dollars, divided into twelve thousand five hundred shares of one hundred dollars each.

And that the names and places of residence of the directors chosen to manage the affairs of the said company for the first year, and until others are chosen in their places, are:

James S. Sluyter, 38 West 23rd Street, New York; Charles W. Durant, 13 William Street, New York; James C. Kennedy, 51 West 25th Street, New York; Frederick S. Littlejohn, 43 Wyckoff Street, Brooklyn; Benjamin F. Bruce, Lenox, Madison County, N. Y.; Robert B. Valkenburgh, Bath, Steuben County, New York; Augustus L. Brown, Fifth Avenue Hotel, New York E. Delafield Smith, 64 East 26th Street, New York; Aaron J. Vanderpoel, 105 East 18th Street, New York; Edward R. Phelps, 151 West 15th Street, New York; Thomas T. Davis Syracuse, Onondaga County, N. Y.; John A. Cooke, Catskill, Greene County, N. Y.; John Butler, Jr., Tarrytown, Westchester County, New York.

In witness whereof, each party hereto has subscribed at the end [fol. 501] hereof his name and place of residence and the number of shares agreed to be taken by him the day and year first above written.

(Names omitted.)

(Acknowledgments omitted.)

Endorsed: Articles of Association of The Central Park, North and East River Railroad Company, N. Y. City. Filed July 19th, 1860 at 9 o'clock A. M. H. P. Willcox, Dep. Sec'y State. Recorded in Book 2 of R. R. Corporations at page 104.

[fol. 502] EXHIBIT H

Declaration of Abandonment by Belt Line Railway Corporation of Portion of Route on East Side of the City of New York Between 14th Street and the Battery

I, Walter C. Burrows, Assistant Secretary to the Belt Line Railway Corporation, do hereby certify that the following is a correct and true extract from the Minutes of a meeting of the Board of Directors of Belt Line Railway Corporation, duly called and held pursuant to due notice, on the 30th day of July, 1918:

"The president stated for the information of the Board that, owing to the abandonment of the ferries across the East River between the Boroughs of Manhattan and Brooklyn, and the curtailment and deterioration of service in such ferries as are still operating across the East River between the Boroughs of Manhattan and Brooklyn, and because of the building of new subways and the opening of bridges connecting the Boroughs of Manhattan and Brooklyn, south of 23d

Street, and because of the third tracking of the Second Avenue Elevated Railroad, paralleling the line of this company along and near the East River waterfront, between 14th Street and the Battery, and also because of the congestion of freight traffic on and along the right of way of this company along and near the East River waterfront from 14th Street to the Battery, making it impossible to maintain sufficient speed to attract passenger traffic, all of which has resulted in entirely changing the character of the territory heretofore served by the line of this company along and near the East River waterfront between 14th Street and the Battery, the running of cars over the lines of this company along and near the East River from 14th Street to the Battery, is no longer necessary for the successful operation of the road, and for the convenience of the public;

"The President further stated that the operation of such lines results in continued deficits, and that their abandonment would facilitate trucking and the handling of freight along the East River waterfront, and he, therefore, recommend that the Board of Directors abandon the franchise of the company to construct, maintain and operate a street surface railroad in, upon along and over the streets, avenues and highways along the East River waterfront, from 14th Street to the Battery.

"Thereupon, on motion duly made and carried, it was

[fol. 503] "Resolved, that the Belt Line Railway Corporation, by its directors, hereby declares the right, privilege and franchise of such Corporation to construct, maintain and operate a street surface railroad in, upon along and over

14th Street, from Avenue C to Avenue D;
Avenue D, from 14th Street to 8th Street;
Avenue D, from 8th Street to 2nd Street;
2nd Street, from Avenue D to Lewis Street;
Houston St., from Lewis Street to Goerck Street;
Houston St., from Goerck Street to Mangin Street;
Goerck St., from Houston Street to Grand Street;
Mangin St., from Houston Street to Grand Street;
Grand St., from Goerck Street to Corlears Street;
Grand St. crossing; from Mangin Street to Corlears St.;
Corlears St., from Cherry Street to South Street;
Monroe Street; from Corlears Street to Jackson St.;
Jackson St., from Cherry Street to Front Street;
South Street; from Corlears Street to Montgomery St.;
Montgomery St.; from South Street to Front Street;
Front Street; from Jackson Street to Montgomery St.;
South Street; from Montgomery Street to James Slip;
South Street; from James Slip to Old Slip;
Front Street, from James Slip to Whitehall Street;
Old Slip, from South Street to Water Street;
Water Street, from Old Slip to Broad Street;
Broad Street, from Water Street to South Street;
South Street, from Broad Street to Whitehall St.;

Whitehall St., from Front Street to South Street;
Avenue A, from 14th Street to 17th Street;
54th Street; from 10th Avenue to five hundred feet west,

are no longer necessary for the successful operation of its road and the convenience of the public, and said Belt Line Railway Corporation does hereby declare the said right, privilege and franchise to maintain and operate a street surface railroad in, upon, along and over said streets to be relinquished and abandoned, and be it

"Further resolved, that this declaration of abandonment be, and the same hereby is, adopted by the Board of Directors of the Belt Line Railway Corporation, and be executed under the Seal of said Corporation, pursuant to Section 184 of the Railroad Law, and be submitted to the stockholders of said Belt Line Railway Corporation at a Special Meeting thereof to be called for such purpose, pursuant to due notice, according to law, to be held in the City of New York, borough of Manhattan, at the office of the Company, 2396 Third Avenue, corner of 130th Street, on the 11th day of September, 1918, and that the Secretary of this Company be and hereby is, directed to cause due notice of the submission of this declaration at such meeting, to be given and published as required by law and be it

"Further resolved, that the officers of this Company be, and they hereby are, authorized and directed, when such declaration of abandonment has been ratified and adopted by the stockholders of this Company, to submit the same to the Public Service Commission of [fol. 504] the State of New York, for the First District, for its approval and to take all other and further steps and proceedings which may be necessary or proper to render such abandonment effective."

I further certify that the within foregoing declaration of abandonment was duly adopted under the seal of the Corporation by the Board of Directors of the Belt Line Railway Corporation at a special meeting held pursuant to due notice on the 30th day of July, 1918.

Witness my signature and the corporate seal of said Belt Line Railway Corporation this 30th day of July, 1918.

Walter C. Burrows, Assistant Secretary. (Corporate Seal.)

I, Walter C. Burrows, Assistant Secretary of Belt Line Railway Corporation, do hereby certify that the within and foregoing declaration of abandonment was duly submitted to the stockholders of the Belt Line Railway Corporation at a special meeting thereof duly called and held pursuant to due notice, on the 11th day of September, 1918, and that at such meeting, the following resolution was duly adopted by the affirmative vote of stockholders holding the total amount of stock issued and outstanding:

"Whereas, at a meeting of the Board of Directors of Belt Line Railway Corporation, the following resolutions and declaration of abandonment were adopted under the seal of this Company:

" 'Resolved, that the Belt Line Railway Corporation, by its directors, hereby declares the rights privileges and franchise of such

Corporation to construct, maintain and operate a street surface railroad in, upon, along and over

14th Street, from Avenue C to Avenue D;
Avenue D, from 14th Street to 8th Street;
Avenue D, from 8th Street to 2nd Street;
2nd Street, from Avenue D to Lewis Street;
Houston Street, from Lewis Street to Goerck Street;
Houston Street, from Goerck Street to Mangin;
Goerck Street, from Houston Street to Grand Street;
Mangin St., from Houston Street to Grand Street;
Grand St., from Goerck Street to Corlears St.;
Grand St. crossing; from Mangin St. to Corlears St.;
Corlears St., from Cherry Street to South Street;
Monroe Street, from Corlears Street to Jackson St.;
[fol. 505] Jackson St., from Cherry Street to Front Street;
South Street, from Corlears Street to Montgomery St.;
Montgomery St., from South Street to Front Street;
Front Street, from Jackson Street to Montgomery St.;
South Street, from Montgomery Street to James Slip;
South Street, from James Slip to Old Slip;
Front Street, from James Slip to Whitehall Street;
Old Slip, from South Street to Water Street;
Water Street, from Old Slip to Broad Street;
Broad Street, from Water Street to South Street;
South Street, from Broad Street to Whitehall Street;
Whitehall St., from Front Street to South Street;
Avenue A, from 14th Street to 17th Street;
54th Street, from 10th Avenue five hundred feet west,

are no longer necessary for the successful operation of its road and the convenience of the public, and said Belt Line Railway Corporation does hereby declare the said right, privilege and franchise to maintain and operate a street surface railroad in, upon, along and over said streets to be relinquished and abandoned, and be it

" 'Further resolved, that this declaration of abandonment be, and the same hereby is, adopted by the Board of Directors of the Belt Line Railway Corporation, and be executed under the seal of said Corporation, pursuant to Section 184 of the Railroad Law, and be submitted to the stockholders of said Belt Line Railway Corporation at a special Meeting thereof, to be called for such purpose, pursuant to due notice, according to law, to be held in the City of New York, Borough of Manhattan, at the office of the Company, 2396 Third Avenue, corner of 130th Street, on the 11th day of September, 1918, and that the Secretary of this Company be and hereby is directed to cause due notice of the submission of this declaration at such meeting, to be given and published as required by law, and be it

" 'Further resolved, that the officers of this Company be, and they hereby are, authorized and directed when such declaration of abandonment has been ratified and adopted by the stockholders of this Company to submit the same to the Public Service Commission of

the State of New York, for the First District, for its approval, and to take all other and further steps and proceedings, which may be necessary or proper to render such abandonment effective.'

"Now, therefore, be it

"Resolved, that the stockholders of Belt Line Railway Corporation do hereby ratify, approve and adopt such declaration of abandonment of route adopted by the Board of Directors of this Company on the 30th day of July, 1918, and do hereby declare the right, privilege and franchise of Belt Line Railway Corporation to construct, maintain and operate a street surface railroad in, upon, along and over

14th Street, from Avenue C to Avenue D;
Avenue D, from 14th Street to 8th Avenue;
Avenue D, from 8th Street to 2nd Street;
2nd Street, from Avenue D to Lewis Street;
Houston St., from Lewis Street to Goerck Street;
Houston St., from Goerck Street to Mangin Street;
Goerck St., from Houston Street to Grand Street;
[fol. 506] Mangin Street, from Houston Street to Grand Street;
Grand Street, from Goerck Street to Corlears St.;
Grand Street Crossing; from Mangin St. to Corlears St.;
Corlears St., from Cherry St. to South St.;
Monroe Street, from Corlears Street to Jackson St.;
Jackson St., from Cherry Street to Front St.;
South Street, from Corlears Street to Montgomery St.;
Montgomery St., from South Street to Front Street;
Front Street, from Jackson Street to Montgomery St.;
South Street, from Montgomery Street to James Slip;
South Street, from James Slip to Whitehall Street;
Old Slip; from South Street to Water Street;
Water Street, from Old Slip to Broad Street;
Broad Street, from Water Street to South Street;
South Street, from Broad Street to Whitehall Street;
Whitehall St., from Front Street to South Street;
Avenue A, from 14th Street to 17th Street;
54th Street, from 10th Avenue five hundred feet west;

to be relinquished and abandoned."

I do hereby further certify that I am the Assistant Secretary of the Belt Line Railway Corporation, that the within and foregoing declaration of abandonment was duly adopted by the Board of Directors of said Corporation under its corporate seal at a special meeting of said Board of Directors, duly called and held on the 30th day of July, 1918, and that such declaration of abandonment was submitted to the stockholders of the Belt Line Railway Corporation at a meeting thereof duly called separately for that purpose, and held on the 11th day of September, 1918:

That notice of the said special meeting of the stockholders of said Belt Line Railway Corporation for the purpose of voting upon a

proposition that such declaration of abandonment be ratified and adopted, was duly waived in writing by the holders and owners of all of the shares of stock of the said Belt Line Railway Corporation then issued and outstanding, who also consented in writing that the said meeting be held on the 11th day of September, 1918, at twelve o'clock noon, at the office of the said Company, No. 2396 Third Avenue, in the Borough of Manhattan, City, County and State of New York; that pursuant to such consent and waiver, the said special meeting of the stockholders of the Belt Line Railway Corporation was [fol. 507] held on the 11th day of September, 1918, at twelve o'clock noon at said office, and that at such meeting there were present in person or by proxy stockholders representing 7,340 shares of stock out of the total of 7,340 shares of stock issued and outstanding; and that at said special meeting of stockholders so held on the 11th day of September, 1918, the said declaration of abandonment so adopted by the Board of Directors was ratified and adopted by the affirmative votes of stockholders holding 7,340 shares of the stock of the said corporation, being the total amount of stock issued and outstanding, to wit, $734,000; and that thereupon this certificate was made pursuant to the direction of the stockholders, under and pursuant to the provisions of the Railroad Law.

Witness my signature and the corporate seal of said Belt Line Railway Corporation, this 22nd day of October, 1918.

Walter C. Burrows, Assistant Secretary. (Corporate Seal.)

State of New York,
Office of the Secretary of State, ss:

I have compared the preceding with the original Declaration of Abandonment of a Portion of the Route of the Belt Line Railway Corporation, filed and recorded in this office on the 3rd day of June, 1919, and do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany this third day of June, one thousand nine hundred and nineteen.

C. W. Taft, Second Deputy Secretary of State. (Seal.)

[fol. 508] The foregoing declaration of abandonment certified by the Secretary of the Belt Line Railway Corporation under the seal of said corporation has been submitted to the Public Service Commission for the First District of the State of New York for its approval and is approved by said Commission.

New York, April 17, 1919.

Public Service Commission for the First District, by Travis H. Whitney, Acting Chairman.

Attest: Frank H. Robinson, Acting Secretary.

[fol. 509] **Exhibit I**

Declaration of Abandonment by the Belt Line Railway Corporation of Portion of Its Route on West Side of the City of New York Between 42nd Street and the Battery and Endorsement Thereon of Approval of the Public Service Commission

I, Garrow T. Geer, Secretary of the Belt Line Railway Corporation, do hereby certify that the following is a correct and true extract from the minutes of a meeting of the Board of Directors of Belt Line Railway Corporation duly called and held, pursuant to due notice, on the 1st day of March, 1921, at 3:15 o'clock in the afternoon:

"The President stated for the information of the Board that owing to the congestion of traffic on the streets on the westerly side of the City of New York below Forty-second Street, on which the West Belt Line of this company is operated, which congestion of traffic is caused by trucks carrying freight to and from the docks along the westerly waterfront of the City of New York, it was impossible for the company to maintain sufficient speed to attract passenger traffic, and the company was unable to operate its cars on any schedule whatever, and that because of the irregularity of the operation of the cars, the traffic on the West Belt Line of this company below Forty-second Street had steadily grown less, until at the present time the receipts per car mile from the West Belt Line are approximately one-third of the operating costs per car mile, and that because the company was operating it- cars along West Street over the same tracks which the New York Central and Hudson River Railroad Company is also using for movement of freight cars, the operation of cars by this company on the West Belt Line was further impeded; and that the running of cars over the lines of this company on the westerly side of the City of New York below Forth-second Street is no longer necessary to the successful operation of the road and the convenience of the public;

"The President further stated that the operation of such lines results in continued deficits, and that their abandonment would facilitate trucking and the handling of freight along the Hudson River waterfront, and that during times of special conditions caused by congestion of freight traffic on West Street, it has been necessary for this company temporarily to cease operating its cars, and he, therefore, recommended that the Board of Directors abandon the franchise of the company to construct, maintain and operate a street surface railroad in, upon, along and over the streets, avenues and highways on the westerly side of the City of New York from Forty-[fol. 510] second Street to the Battery.

"Thereupon, on motion duly made and carried, it was

" 'Resolved, that the Belt Line Railway Corporation, by its directors, hereby declares the right, privilege and franchise of such corporation to construct, maintain and operate a street surface railroad in, upon, along and over

10th Avenue, from 42nd Street to West Twelfth Street;
West 12th Street from 10th Avenue to Greenwich Street;
West Street, from West 12th Street to Battery Place;
Greenwich Street, from West 12th Street to Battery Pl.;
Battery Place, from West Street to State Street;
State Street, from Battery Place to Whitehall Street;
Whitehall Street, from State Street to South Ferry;
Whitehall Street, from State St. to Bowling Green;
Bowling Green, from Whitehall Street to connect with track in Battery Place;

including also the right to construct, maintain and use tracks from West Street through and along Chambers Street to its intersection with Hudson Street;

and no longer necessary for the successful operation of its road and the convenience of the public, and said Belt Line Railway Corporation does hereby declare the said right, privilege and franchise to maintain and operate a street surface railroad in, upon, along and over said streets, to be relinquished and abandoned, and be it

" 'Further resolved that this declaration of abandonment be, and the same hereby is, adopted by the Board of Directors of the Belt Line Railway Corporation, and be executed under the seal of said corporation, pursuant to Section 184 of the Railroad Law, and be submitted to the stockholders of said Belt Line Railway Corporation at a special meeting thereof, to be called for such purpose, pursuant to due notice, according to law, to be held in the City of New York, Borough of Manhattan, at the office of the company, 2396 Third Avenue, corner of 130th Street, on the 2nd day of March, 1921, at ten o'clock in the forenoon, and that the Secretary of this company be and hereby is, directed to cause due notice of the submission of this declaration at such meeting, to be given and published as required by law, and be it

[fol. 511] " 'Further resolved, that the officers of this company be, and they hereby are, authorized and directed, when such declaration of abandonment has been ratified and adopted by the stockholders of this company, to submit the same to the Public Service Commission of the State of New York, for the First District, for its approval, and to take all other and further steps and proceedings which may be necessary or proper to render such abandonment effective.' "

I further certify that the within foregoing declaration of abandonment was duly adopted under the seal of the corporation by the Board of Directors of the Belt Line Railway Corporation at a special meeting held pursuant to due notice on the 1st day of March, 1921.

Witness my signature and the corporate seal of said Belt Line Railway Corporation this 1st day of March, 1921.

Garrow T. Geer, Secretary. (Corporate Seal.)

I, Garrow T. Geer, Secretary of Belt Line Railway Corporation, do hereby certify that the within and foregoing declaration of abandonment was duly submitted to the stockholders of the Belt Line Rail-

way Corporation at a special meeting thereof duly called and held pursuant to due notice, on the 2nd day of March, 1921, at 10 o'clock in the forenoon, and that at such meeting the following resolution was duly adopted by the affirmative vote of stockholders holding the total amount of stock issued and outstanding:

"Whereas, at a meeting of the Board of Directors of Belt Line Railway Corporation, the following resolutions and declaration of abandonment were adopted under the seal of this Company:

" 'Resolved that the Belt Line Railway Corporation, by its directors, hereby declares the right, privilege and franchise of such corporation to construct, maintain and operate a street surface railroad, in, upon, along and over

[fol. 512] 10th Avenue, from 42nd Street to West Twelfth St.;
West 12th St., from 10th Avenue to Greenwich St.;
West Street, from West 12th Street to Battery Place;
Greenwich Street, from West 12th Street to Battery Place;
Battery Place, from West Street to State Street;
State Street, from Battery Place to Whitehall Street;
Whitehall Street, from State Street to South Ferry;
Whitehall Street, from State Street to Bowling Green;
Bowling Green, from Whitehall Street to connect with track in Battery Place;

including also the right to construct, maintain and use tracks from West Street through and along Chambers Street to its intersection with Hudson Street;

are no longer necessary for the successful operation of its road and the convenience of the public, and said Belt Line Railway Corporation does hereby declare the said right, privilege and franchise to maintain and operate a street surface railroad in, upon, along and over said streets, to be relinquished and abandoned, and be it

" 'Further resolved that this declaration of abandonment be, and the same hereby is, adopted by the Board of Directors of the Belt Line Railway Corporation, and be executed under the seal of said corporation, pursuant to Section 184 of the Railroad Law, and be submitted to the stockholders of said Belt Line Railway Corporation at a Special Meeting thereof, to be called for such purpose, pursuant to due notice, according to law, to be held in the City of New York, Borough of Manhattan, at the office of the company, 2396 Third Avenue, corner of 130th Street, on the 2nd day of March, 1921, at 10 o'clock in the forenoon, and that the Secretary of this Company be and hereby is, directed to cause due notice of the submission of this declaration at such meeting; to be given and published as required by law, and be it

" 'Further resolved, that the officers of this company be and they hereby are, authorized and directed, when such declaration of abandonment has been ratified and adopted by the stockholders of this [fol. 513] company, to submit the same to the Public Service Commission of the State of New York, for the First District, for its ap-

proval, and to take all other and further steps and proceedings which may be necessary or proper to render such abandonment effective.'

"Now, therefore, be it

"Resolved, that the stockholders of Belt Line Railway Corporation do hereby ratify, approve and adopt such declaration of abandonment of route adopted by the Board of Directors of this company on the 1st day of March, 1821, and do hereby declare the right, privilege and franchise of Belt Line Railway Corporation to construct, maintain and operate a street surface railroad in, upon, along and over

10th Avenue, from 42nd Street to West Twelfth Street;
West 12th Street, from 10th Avenue to Greenwich Street;
West Street, from West 12th Street to Battery Place;
Greenwich Street, from West 12th Street to Battery Place;
Battery Place, from West Street to State Street;
State Street, from Battery Place to Whitehall Street;
Whitehall Street, from State Street to South Ferry;
Whitehall Street, from State Street to Bowling Green;
Bowling Green, from Whitehall Street to connect with track in Battery Place;

Including also the right to construct, maintain and use tracks from West Street through and along Chambers Street to its intersection with Hudson street;

to be relinquished and abandoned."

I do hereby further certify that I am the Secretary of the Belt Line Railway Corporation, that the within and foregoing declaration of abandonment was duly adopted by the Board of Directors of said corporation under its corporate seal at a special meeting of said Board of Directors, duly called and held on the 1st day of March, 1921, at 3:15 o'clock in the afternoon, and that such declaration of abandonment was submitted to the stockholders of the Belt Line [fol. 514] Railway Corporation at a meeting thereof duly called separately for that purpose, and held on the 2nd day of March, 1921, at 10 o'clock in the forenoon.

That notice of the said special meeting of the stockholders of said Belt Line Railway Corporation for the purpose of voting upon a proposition that such declaration of abandonment be ratified and adopted was duly waived in writing by the holders and owners of all of the shares of stock of the said Belt Line Railway Corporation then issued and outstanding, who also consented, authorized and approved in writing that the said meeting be held on the 2nd day of March, 1921, at 10 o'clock in the forenoon, at the office of the said company, No. 2396 Third Avenue, in the Borough of Manhattan, City, County and State of New York; that pursuant to such consent and waiver the said special meeting of the stockholders of the Belt Line Railway corporation was held on the 2nd day of March, 1921, at 10 o'clock in the forenoon at said office, and that at such meeting there were present in person or by proxy stockholders rep-

resenting 7,340 shares of stock out of the total of 7,340 shares of stock issued and outstanding; and that at said special meeting of stockholders so held on the 2nd day of March, 1921 the said declaration of abandonment so adopted by the Board of Directors was ratified and adopted by the affirmative votes of stockholders holding 7,340 shares of the stock of the said corporation, being the total amount of stock issued and outstanding, to wit, $734,000; and that thereupon this certificate was made pursuant to the direction of the stockholders, under and pursuant to the provisions of the Railroad Law.

[fol. 515] Witness my signature and the corporate seal of said Belt Line Railway Corporation, this 2nd day of March, 1921.

Garrow T. Geer, Secretary. (Corporate Seal.)

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State of New York,
Office of the Secretary of State, ss:

I have compared the preceding with the original Declaration of Abandonment of Route of the Belt Line Railway Corporation filed and recorded in this office on the 24th day of March, 1921, and do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany this twenty-fourth day of March, one thousand nine hundred and twenty-one.

E. W. Taft, Second Deputy Secretary of State. (Seal.)

[fol. 516] The foregoing declaration of abandonment certified by the Secretary under the seal of the corporation therein named, has been submitted to the Public Service Commission for the First District of the State of New York for its approval and is approved by said Commission.

New York, March 22, 1921.

Public Service Commission for the First District. Alfred M. Barrett, Commissioner. (Seal.)

"Attest: James B. Walker." (L. S.)

[fol. 517] Statement re Exhibit J

Order of the Public Service Commission of the State of New York for the First District, dated October 29, 1912, fixing joint rates.

Same as exhibit A annexed to complaint.

[fol. 518] EXHIBIT K

Order of the Public Service Commission of the State of New York for the First District in case No. 2421, dated October 24, 1919, permitting discontinuance of transfers between the 59th Street Crosstown Line and certain intersecting lines.

(Caption and certification omitted)

Whereas, the Belt Line Railway Corporation has made application in writing to this Commission, under date of October 1, 1919, for permission to put into effect immediately after publication at stations and filing with the Commission changes in its tariff schedules, B. L. Ry. Corp.—No. 1 revised, providing for the discontinuance of transfers between its 59th Street Crosstown Line and the Eighth Avenue Line, the Sixth and Amsterdam Avenue Line and the Broadway and Columbus Avenue Line, of the New York Railways Company, and

Whereas, a hearing has been held on said application on October 7, 1919, and has been closed, and

Whereas, good cause has been shown why the said application should be granted, it is

Ordered that permission be and the same hereby is granted to the Belt Line Railway Corporation to put into effect immediately after publication at stations and filing with the Commission the said changes in its tariff schedules.

By the Commission

James B. Walker, Secretary. (Seal.)

[fol. 519] EXHIBIT L

Order of the Public Service Commission of the State of New York for the First District in case No. 2467, dated February 27th, 1920, permitting discontinuance of transfers between 59th Street Crosstown Line and the Fourth and Madison Avenue Line of the N. Y. & H. R. R. Co.

(Caption and certification omitted)

Whereas the Belt Line Railway Corporation has made application to this Commission in writing verified the — day of February, 1920 for an Order granting permission to put into effect upon less than thirty days' notice and filing with the Commission changes in Page 1 and Page 9 of its tariff B. L. Ry. Corp'n No. 1 revised, which changes provide for the discontinuance of transfers between its 59th Street Crosstown Line and the Fourth and Madison Avenue line of the New York and Harlem Railroad Company; and

Whereas good cause has been shown why such permission should be granted as hereinafter provided, therefore it is

Ordered that permission be and the same hereby is granted to the Belt Line Railway Corporation to file and put into effect the amendments to its tariff schedule hereinabove described to take effect March 1, 1920.

By the Commission

James B. Walker, Secretary. (Seal.)

[fol. 520] STATEMENT RE EXHIBIT M

Order of the Public Service Commission for the First District, dated March 19, 1913, consenting to mortgage and authorizing the issue of stocks and bonds by the Belt Line Railway Corporation.

Same as Exhibit B annexed to complaint.

[fol. 521] STATEMENT RE EXHIBIT N

Order of the Public Service Commission for the First District, dated July 22, 1913, authorizing the issue of $49,700 of the capital stock of the Belt Line Railway Corporation, and the acquisition thereof by the Third Avenue Railroad Company.

Same as exhibit C annexed to complaint.

[fol. 522] STATEMENT RE EXHIBIT O

Order of the Public Service Commission for the First District, dated November 7, 1913, authorizing the issue by the Belt Line Railway Corporation of $253,000 of its capital stock and the acquisition thereof by the Third Avenue Railroad Company.

Same as exhibit D annexed to complaint.

[fol. 522½] STATEMENT RE EXHIBIT P

Order of the Public Service Commission for the First District, dated October 8, 1915, authorizing the issue by the Third Avenue Railroad Company of $2,020,500 of its bonds.

Same as exhibit E annexed to complaint.

[fol. 523] EXHIBIT Q

Before the Public Service Commission for the First District, 49 Lafayette Street, Borough of Manhattan, New York City, 18th Day of June, 1920

Present: Hon. Alfred M. Barrett, Deputy and Acting Commissioner.

Case No. 1364

In the Matter of the Hearing on the Application of THE BELT LINE RAILWAY CORPORATION for an order modifying the order of the Public Service Commission, First District, dated October 29th, 1912, so that the exchange of transfers between the lines operated by the Belt Line Railway Corporation and the lines operated by all other street-surface railway corporations named in said order dated October 29th, 1912, with the exception of Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, shall be discontinued.

Order Suspending Tariff

Certain revised pages of its tariff schedule having been filed with this Commission under date of May 24, 1920, by the Belt Line Railway Corporation providing certain changes in transportation privileges, which revised pages are designated generally as follows:

"First revised pages Nos. 2 and 3 and Second revised page No. 9 [fol. 524] of Belt Line Railway Corporation Tariff," effective June 22, 1920, and it appearing to the Commission that the provisions of the said revised pages of the said tariff have not heretofore been in effect and are questionable with respect to their propriety and lawfulness,

It is

Ordered that the effective date of the revised pages of the said tariff schedule, above specified, be and it hereby is postponed and the operation of the said revised pages of the said tariff schedule be and they hereby are suspended and the use of the fares, regulations and practices therein stated deferred until the 22nd day of July, 1920, unless the Commission by order entered herein shall determine otherwise as to the effective date or the lawfulness in whole or in part of said revised pages of said tariff schedule.

It is further ordered that a copy hereof be served upon the aforesaid carrier, party to said schedule.

By the commission.

James B. Walker, Secretary. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

I, James B. Walker, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the

above with the original approved by said Commission on June 18, 1920, and that it is a correct transcript therefrom and of the whole of the original.

[fol. 525] In testimony whereof I have hereunto subscribed my hand and affixed the seal of the Commission, this 19th day of June, 1920.

James B. Walker, Secretary. (Seal.)

[fol. 526] STATEMENT RE EXHIBIT R

Order of the Public Service Commission for the First District, dated July 9, 1920, fixing the joint rate at seven cents.

Same as Exhibit K attached to complaint.

[fol. 527] EXHIBIT S

Order of the Public Service Commission of the State of New York for the First District in case No. 1364, dated November 4, 1920, ordering a rehearing and deferring the putting into effect of any rate fixed by the order of July 9, 1920 (Exhibit R).

(Caption and Certification Omitted)

An order having been duly made by the Commission herein July 9, 1920, designated order "A", fixing the maximum joint rate, fare or charge to be exacted for through transportation over any through route established by a previous order of the Commission made herein on October 29, 1912, which through route involves a transfer by a passenger from the lines of one to another of the following companies, the New York Railways Company, the Central Park, North and East River Railroad Company and the Second Avenue Railroad Company in the City of New York, commencing September 13, 1920, at the sum of seven cents instead of five cents; and the Commission being now in receipt of a communication dated July 23, 1920, from Alfred T. Davison, Attorney for Belt Line Railway Corporation, requesting a rehearing in respect of the matters determined in and by said order of July 9, 1920,

Ordered that said application be and the same hereby is granted and that such rehearing be had by and before the commission at the hearing room of the Commission, No. 49 Lafayette Street, Borough of Manhattan, City of New York on the 5th day of November, 1920, at 10:30 o'clock in the forenoon.

Further ordered, that the several dates specified in said order of July 9, 1920, on or before which any act is authorized or required [fol. 528] to be done or performed by said corporations (or said Receiver,) or any of them, be and the same hereby are deferred and

postponed until such date or dates as shall or may be fixed by the Commission at or after the termination of said rehearing.

By the Commission.

James B. Walker, Secretary. (Seal.)

[fol. 529] EXHIBIT T

Notification as to the Agreed Apportionment of the Joint Rate Fixed by the Commission's Transfer Order of October 29, 1912

(Caption and certification omitted)

To the Public Service Commission for the First District:

Pursuant to the terms of an Order herein, dated October 29th, 1912, New York Railways Company hereby notifies the Commission that agreements have been entered into between New York Railways Company and Central Park North and East River Railroad Company, and between New York Railways Company and George W. Linch, as Receiver of Second Avenue Railroad Company in the City of New York, as to the portion of the joint rates or charges to which each of them shall be entitled for transportation over the through routes between the lines of the said companies named in Schedules 1 to 5, as annexed to said Order, as follows:

For passengers travelling over the lines of New York Railways Company on the through routes indicated in schedules 1 to 5, where fare is paid on a line of New York Railways Company, or on 59th Street line of Central Park North & East River Railroad Company, New York Railways Company shall receive three cents and Central Park North & East River Railroad Company two cents.

For passengers paying fare on the lines of Second Avenue Railroad Company and transferring to the Eighth Avenue Line of New York Railways Company, the New York Railways Company shall receive no part of the fare; and for passengers paying fare on the Eighth Avenue Line of New York Railways Company and transferring to the lines of Second Avenue Railroad Company, the Second Avenue Railroad Company, or its Receiver shall receive no part of the fare, but the privileges accorded by the Second Avenue Lines shall be offset against the privilege accorded by the Eighth Avenue Line.

Dated New York, January 10th, 1913.

New York Railways Company, by (Signed) Frank Hedley, Vice-President & General Manager.

[fol.530] STATEMENT RE EXHIBIT U

Statement entitled "Belt Line Railway Corporation, Income from Operations, Year ended June 30, 1918."

Same as exhibit F annexed to complaint.

[fol. 531] STATEMENT RE EXHIBIT V

Statement showing income from operations of the Belt Line Railway Corporation for the year ended June 30, 1919.

Same as exhibit G annexed to complaint.

[fol. 532] STATEMENT RE EXHIBIT W

Statement showing income from operation and operating expenses of the Belt Line Railway Corporation for the year ended June 30, 1920.

Same as exhibit H annexed to complaint.

[fol. 533] STATEMENT RE EXHIBIT X

Statement showing income from operations and operating expenses for the period of four months ending October 31, 1920.

Same as exhibit I annexed to complaint.

[fol. 534] STATEMENT RE EXHIBIT Y

Statement showing income and operating expenses of the Belt Line Railway Corporation from the beginning of its operations, March 22, 1913, to October 31, 1920, by fiscal years, as appears in reports made to the Public Service Commission.

Same as exhibit J annexed to complaint.

[fol. 535] EXHIBIT XA

Letter from the Public Service Commission to Edward A. Maher, Jr., Vice-President of the Third Avenue Railway System, Dated November 13, 1919

New York, November 13, 1919.

Mr. E. A. Maher, Jr., Vice-President Third Avenue Railway System, 130th Street and Third Avenue, New York City.

DEAR SIR: In your letter of October 24, 1919, you informed the Commission that the matter of service in your 59th Street Crosstown Line would receive immediate attention. Since that time an additional check was made on November 5, 1919, which still shows enormous overloading during both morning and evening rush hours.

Attached is blue print showing this overloading in tabulated form.

Please advise the Commission what action you will take in the matter.

Very truly yours, (Signed) James B. Walker, Secretary.

[fol. 536] EXHIBIT YA

Letter from the Public Service Commission to S. W. Huff, President Third Avenue Railway Company System, Dated January 8, 1920

New York, January 8, 1920.

Mr. S. W. Huff, President Third Avenue Railway Company, 130th Street & 3rd Avenue, New York City.

DEAR SIR: In your letter of November 29th, with reference to the service on your 59th Street Crosstown Line you stated that the New York Railways Company has petitioned the Federal Court for the right to discontinue the issuance of transfers between the lines of the New York Railways Company and your 59th Street Crosstown Line, and that in the event of said application being granted, that there no doubt will be a decrease in the riding on the 59th Street Crosstown Line.

Up to the present time transfers are still interchanged and the riding on the 59th Street Crosstown Line is just as heavy as when you were requested on November 13th to increase the service during the rush hours.

Enclosed you will find a tabulation of the rush hour service observed January 6th. The loading during one half hour in the morning rush exceeded 100% and during the evening rush there were three 15-minute periods with an overload in ex-ess of 100%. The average condition of loading per car for the two hours from 7 to 9 a. m. was 182% and for the two hours from 5 to 7 p. m., 199%.

You are requested to increase the service during both the morning and evening rush and advise the Commission of your action in the matter.

Very truly yours, (Signed) James B. Walker, Secretary.

EXHIBIT YA-2

Public Service Commission for the First District

Bureau of Transit Inspection Sheet No. YA2

Line: 59th Crosstown. Location of Observer: ——. Computer: G. P. H. Checked by: —— ——. Date: Jan. 6, 1920. Bound: West and East. Investigation No. 15751. F 1071.

Westbound

Time, A. M.	No. of cars operated	Total No. of seats	Total No. of passengers	Average condition of loading per car	No. of cars with passengers standing	No. of passengers standing	Average standing per car
7– 7.15	10	370	620	168%	9	250	25
7.30	12	444	704	159%	10	295	22
7.45	14	518	966	186%	13	475	32
8.00	10	370	645	174%	9	275	27
8– 8.15	13	481	714	148%	11	240	18
8.30	9	333	798	240%	9	465	52
8.45	11	407	951	234%	11	545	49
9.00	9	333	533	160%	7	200	22
7– 9.00	88	3,256	5,931	182%	79	2,745	30

Bureau of Transit Inspection Sheet No. YA2—Continued

Eastbound

Time, A. M.	No. of cars operated	Total No. of seats	Total No. of passengers	Average condition of loading per car	No. of cars with passengers standing	No. of passengers standing	Average standing per car
5– 5.15	13	481	837	174%	11	365	27
5.30	9	333	878	264%	9	545	61
5.45	12	444	865	195%	10	445	35
6.00	13	481	1,331	277%	13	850	65
6– 6.15	8	296	661	223%	8	365	46
6.30	10	370	511	138%	5	180	14
6.45	9	333	491	147%	7	170	18
7.00	8	296	461	156%	5	180	21
5– 7.00	82	3,034	6,035	199%	68	3,100	37

[fol. 538] EXHIBIT Z

Letter from the Public Service Commission to S. W. Huff, President Third Avenue Railway System, Dated April 5, 1920

New York, April 5, 1920.

Mr. S. W. Huff, President Third Avenue Railway System, 130th Street and 3rd Avenue, New York City.

DEAR SIR: Observations made of your 59th Street Crosstown Line on March 26th, 29th and 31st, 1920, show heavy overloading outside of the daily rush hours. On March 31st between 7 and 9 p. m. the westbound direction showed an average condition of loading per car of 166 per cent for 44 trips operated. During these two hours three periods had an overload of 100 or more per cent.

You will note that with this overloading the operation was less than one half of the regular rush hour operation. In the eastbound direction between 7 p. m. and midnight seventeen of the twenty periods were overload.

You are requested to supplement the service after 7 p. m. at least sufficiently to materially reduce the overloading shown on enclosed tabulation.

Very truly yours, (Signed) James B. Walker, Secretary.

[fol. 538½]

EXHIBIT Z-2

Public Service Commission for the First District

Line: 59th Street Crosstown. Location of Observer: 5th Ave. Computor: ——. Checked by: —— ——. Date: March 31, 1920. Bound: East and West. Investigation No. 15751. File No. 1071.

Eastbound

Time, P. M.	No. of cars operated	Total No. of seats	Total No. of passengers	Average condition of loading per car	No. of cars with passengers standing	No. of passengers standing	Average standing per car
7– 7.15	7	259	291	112%	4	55	5
7.30	7	259	373	114%	5	130	16
7.45	8	296	276	93%	2	15	..
8–	5	185	310	168%	5	125	25
8.15	4	148	303	205%	4	155	39
8.30	4	148	383	260%	4	235	59
8.45	4	148	192	130%	3	50	11
9–	5	185	240	130%	2	70	11
9.15	4	148	223	151%	2	75	19
9.30	5	185	274	149%	4	90	18
9.45	4	148	176	119%	3	40	7
10–	5	185	203	110%	3	30	3
10.15	4	148	148	100%	..	...	..
10.30	4	148	188	127%	3	40	10
10.45	5	185	305	165%	3	120	24
11–	5	185	285	154%	4	100	20

11.15	4	145	243	164%	4	95	24
11.30	6	222	301	136%	4	85	13
11.45	7	259	169	61%	1	5	..
12–	4	148	153	103%	2	20	1
7–12.00, Total	101	3,737	5,037	135%	62	1,535	13
			Westbound				
7– 7.15	6	222	302	136%	5	90	13
7.30	7	259	337	130%	5	95	11
7.45	6	222	507	228%	6	285	47
8–	7	259	519	200%	7	260	37
8.15	5	185	395	214%	5	210	42
8.30	5	185	335	181%	5	150	30
8.45	4	148	183	123%	2	80	9
9–	4	148	127	86%	1	20	..
7– 9.00, Total	44	1,628	2,705	166%	36	1,190	24

[fol. 539] EXHIBIT BA

Letter from the Public Service Commission to S. W. Huff, President Third Avenue Railway System, Dated November 12, 1920

New York, November 12, 1920.

Mr. S. W. Huff, President Third Avenue Railway Company, 130th Street & 3rd Avenue, New York City.

DEAR SIR: An observation was made of the service on your 59th Street Crosstown Line at 59th Street and 5th Avenue on October 28, 1920, from 7:00 a. m., to 1:00 p. m. west bound, and on October 29th from 1:00 to 7:00 p. m. in both directions. The results of the observation have been placed on three sheets of tabulation, copies of which are attached hereto.

Please note that standing passengers were carried in nine a. m. rush hour periods and in six non-rush hour periods on October 28th. Excessive overloading was noted in eight rush hour periods.

On October 29th you will note that standing passengers were carried in every period eastbound except two, and in all except three periods in the westbound direction. Excessive overloading during the p. m. rush eastbound was observed in six periods. The 198 cars operated eastbound shown an average of seventeen standing passengers per car for the six hour period, from 1:00 to 7:00 p. m. and in the westbound direction an average of seven standees per car is shown for the same period.

You are requested to immediately supplement the service on this line by operating sufficient additional cars to provide a number of seats equal to the number of passengers carried in each fifteen minute period during the non-rush hours, and to supplement the service during the rush hour periods to a point that will reduce the loading to less than 150% per period.

Kindly notify the Commission of your action in this matter on or before November 22, 1920.

Very truly yours, (Signed) James B. Walker, Secretary.

EXHIBIT BA-2

Public Service Commission for the First District

Sheet No. 1, Ba2

Line: 59th St. Crosstown. Location of Observer: 59th & 5th Ave. Computer: JOM. Checked by: —— ——.
Date: Oct. 28, 1920. Bound: West. Investigation No. 15751.

Time, A. M.	No. of cars operated	Total No. of seats	Total No. of passengers	Average condition of loading per car	No. of cars with passengers standing	No. of passengers standing	Average standing per car
7– 7.15	10	370	611	165%	9	260	24
7.30	10	370	742	201%	9	395	37
7.45	12	444	1,021	230%	11	595	48
8	14	518	1,151	222%	13	645	45
8.15	12	444	899	202%	12	455	38
8.30	11	407	920	226%	11	515	47
8.45	11	407	937	230%	11	550	48
9–	8	296	479	162%	4	225	23
9.15	12	444	545	123%	6	140	8
9.30	10	370	296	.....	4	40	..
9.45	7	259	289	112%	5	30	4
10–	7	259	225	.....	1	25	..
10.15	6	222	230	104%	2	35	1
10.30	6	222	233	105%	3	35	2
10.45	8	296	290	.....	2	50	..
11–	6	222	218	.....	2	35	..

Sheet No. 1, Ba2—Continued

Time, A. M.	No. of cars operated	Total No. of seats	Total No. of passengers	Average condition of loading per car	No. of cars with passengers standing	No. of passengers standing	Average standing per car
11.15	7	259	208	.....	..	...	..
11.30	7	259	285	110%	4	50	4
11.45	6	222	214	.....	3	25	..
12–P. M.	7	259	226	.....	..	...	..
12.15	8	296	300	101%	2	45	1
12.30	7	259	242	.....	1	15	..
12.45	8	296	234	.....	..	...	..
1–	7	259	297	115%	3	50	5
7 9.00	88	3,256	6,760	208%	80	3,640	40

EXHIBIT BA-3

Public Service Commission for the First District

Sheet No. 2

Line: 59th St. Crosstown. Location of Observer: 5th Ave. Computer: WJM. Checked by: M. Date: Oct. 29, 1920. Bound: East. Investigation 15751.

Time, P. M.	No. of cars operated	Total No. of seats	Total No. of passengers	Average condition of loading per car	No. of cars with passengers standing	No. of passengers standing	Average standing per car
1– 1.15	7	259	260	100%	..	3	45
1.30	6	222	276	125%	9	3	65
1.45	7	259	305	118	7	5	85
2–	8	296	293	99	..	5	55
2.15	7	259	296	114	5	3	55
2.30	7	259	316	122	8	3	90
2.45	7	259	299	115	6	4	80
3–	7	259	324	125	9	5	65
3.15	7	259	352	136	13	6	100
3.30	7	259	487	188	33	6	240
3.45	8	296	374	126	10	4	85
4–	6	222	419	188	33	4	210
4.15	9	333	355	107	2	3	80
4.30	7	259	409	158	21	7	150
4.45	7	259	327	126	10	5	80
5–	10	370	548	148	18	6	195

Sheet No. 2—Continued

Time, P. M.	No. of cars operated	Total No. of seats	Total No. of passengers	Average condition of loading per car	No. of cars with passengers standing	No. of passengers standing	Average standing per car
5.15	10	370	560	151	19	8	190
5.30	10	370	815	220	44	10	445
5.45	11	407	757	186	32	11	350
6–	10	370	695	188	32	9	325
6.15	12	444	784	177	28	11	340
6.30	13	481	574	119	7	7	125
6.45	7	259	434	168	25	6	175
7–	8	296	379	128	10	6	95
5– 7.00, Total	81	2,997	4,998	167%	25	68	2,045
1– 7.00, Total	198	7,326	10,638	145%	17	140	3,725

EXHIBIT BA-4

Public Service Commission for the First District

Sheet No. 3

Line: 59th St. Crosstown. Location of Observer: 5th Ave. Computer: AHT. Checked by: M. Date: Oct. 29, 1920. Bound: West. Investigation No. 15751.

Time, P. M.	No. of cars operated	Total No. of seats	Total No. of passengers	Average condition of loading per car	No. of cars with passengers standing	No. of passengers standing	Average standing per car
1– 1.15	6	222	286	129%	5	70	11
1.30	7	259	264	102%	3	40	1
1.45	7	259	280	108%	4	50	3
2–	6	222	225	101%	2	35	..
2.15	8	296	309	104%	5	45	2
2.30	7	259	288	111%	5	70	4
2.45	7	259	279	108%	5	35	3
3–	7	259	298	115%	3	65	6
3.15	6	222	333	150%	3	120	18
3.30	6	222	235	106%	3	40	2
3.45	8	296	433	146%	5	165	17
4–	8	296	316	107%	3	50	2
4.15	7	259	334	129%	4	100	11
4.30	9	333	393	118%	5	95	7
4.45	7	259	337	130%	5	100	11
5–	7	259	414	160%	5	155	22

Sheet No. 3—Continued

Time, P. M.	No. of cars operated	Total No. of seats	Total No. of passengers	Average condition of loading per car	No. of cars with passengers standing	No. of passengers standing	Average standing per car
5.15	9	333	447	134%	5	135	13
5.30	10	370	499	135%	8	160	13
5.45	10	370	395	107%	6	80	2
6–	12	444	546	123%	8	145	8
6.15	12	444	399	.....	4	40	..
6.30	11	407	375	.....	3	65	..
6.45	11	407	305	.....	2	45	..
7–	10	370	533	144%	7	200	16
1– 7.00, Total	198	7,126	8,523	120%	108	2,105	7

[fol. 543] EXHIBIT BB

Letter from the Public Service Commission to S. W. Huff, President Third Avenue Railway System, Dated November 16, 1920

New York, November 16, 1920.

Mr. S. W. Huff, President Third Avenue Railway Company, 130th Street & 3rd Avenue, New York City.

DEAR SIR: An observation was made of the service on the 59th Street Crosstown Line Saturday, November 13, 1920, from 12:30 to 3:30 P. M. in both directions, also from 7:00 to 9:30 P. M., westbound, and from 10:30 P. M. to 1:00 A. M. November 14th eastbound at 59th Street and 5th Avenue. The results of the observation have been placed on two sheets of tabulation, copies of which are attached hereto.

You will note that standing passengers were carried in every period eastbound, and in nine periods westbound during the afternoon hours, also in twelve periods during the evening hours.

This is inadequate service and you are requested to supplement this service by operating additional cars during the afternoon and evening hours on Saturdays.

Kindly notify the Commission on or before November 26th when this additional service can be expected.

Very truly yours, (Signed) James B. Walker, Secretary.

EXHIBIT BB-2

Public Service Commission for the First District

Line: 59th St. Crosstown. Dated: Nov. 13, 1920. Bound: East & West. Investigation No. 15751

East Bound

Time, P. M.	No. of cars operated	Total No. of seats	Total No. of passengers	Average condition of loading per car	No. of cars with passengers standing	No. of passengers standing	Average standing per car
12.30–.45...	9	333	587	176%	7	270	28
1– ...	8	296	446	151%	5	165	19
1.15...	9	333	513	154%	7	190	20
1.30...	9	333	412	124%	3	100	9
1.45...	9	333	384	115%	4	85	6
2– ...	7	259	303	117%	4	60	6
2.15...	7	259	364	141%	7	105	15
2.30...	7	259	393	152%	7	134	19
2.45...	7	259	374	144%	7	115	16
3– ...	7	259	394	152%	6	150	19
3.15...	6	222	372	168%	6	150	25
3.30...	7	259	444	171%	6	185	26
12.30–3.30 Total ...	92	3,404	4,986	146%	69	1,689	17

West Bound

12.30–45...	8	296	364	123%	4	80	8
1– ...	9	333	308	.....	2	35	..
1.15...	10	370	334	.....	3	55	..
1.30...	9	333	365	110%	5	65	4
1.45...	6	222	185	.....	2	25	..
2– ...	10	370	384	104%	4	70	1
2.15...	9	333	334	100%	4	40	..
2.30...	7	259	402	155%	4	190	20
2.45...	7	259	357	138%	5	120	14
3– ...	6	222	248	112%	2	35	4
3.15...	7	259	359	139%	6	105	14
3.30...	6	222	276	124%	3	70	9
12.30–3.30...	94	3,478	3,916	113%	44	890	5

[fol 545]

EXHIBIT BB-3

Public Service Commission for the First District

Sat. Sheet No. 2

Line: 59th St. Crosstown. Location of Observer: 5th Ave. Computer: O. K. MJM. Checked by: M. Dated: Nov. 13, 1920. Bound: East & West. Investigation No. 15751.

P. M.

West Bound

Time	No. of cars operated	Total No. of seats	Total No. of passengers	Average condition of loading per car	No. of cars with passengers standing	No. of passengers standing	Average standing per car
7– 7.15	7	259	298	115%	3	50	6
7.30	6	222	270	122%	3	60	8
7.45	6	222	357	161%	6	135	23
8–	6	222	507	228%	6	285	47
8.15	7	259	449	173%	7	190	27
8.30	5	185	313	169%	4	135	26
8.45	7	259	284	110%	3	55	4
9–	7	259	219	.....	1	10	..
9.15	6	222	201	.....	1	5	..
9.30	7	259	193	.....	..	...	..
7– 9.30	64	2,368	3,091	131%	34	925	11

P. M.				East Bound			
10.30–45	4	148	157	106%	1	25	2
11	4	148	142	.....	1	15	..
11.15	5	185	280	151%	5	95	19
11.30	6	222	237	107%	2	45	2
11.45	6	222	330	149%	5	130	18
12–A. M.	7	259	223	.....	2	35	..
12.15	6	222	131	.....	1	20	..
12.30	5	185	148	.....	..	...	..
12.45	3	111	83	.....	1	5	..
1–	2	74	112	151%	1	45	19
10.30 P. M. 1 A. M.....	48	1,776	1,843	104%	19	415	1

EXHIBIT BC

Belt Line Railway Corporation

Income from Operations for the Period February 1st, 1921, to September 30th, 1922

Revenues:

Passenger revenue:

59th St. line	West Belt line				Per passenger
13,426,836	77,735	Passengers at 5¢ each	$675,228.55		
5,479,044	.....	" " 2¢ " (3rd Ave.)	109,580.88		
4,081,246	.....	" " 2¢ " (42nd St.)	81,624.92		
563,580	2,640	Free Transfers	.....		
23,550,706	80,375	Total Passengers		$866,434.35	
		Advertising		15,440.04	
		Rent of Buildings and Other Property		73,970.78	
		Rent of Tracks and Terminals		1,250.00	
		Total Revenue		$957,095.17	

Operating expenses (not including any allowance to depreciation):

Maintenance of Way and Structures	$103,729.90	.44¢
Maintenance of Equipment	67,057.77	.28¢
Power Supply	64,217.51	.27¢

Operation of Cars		297,705.14	1.26¢
Injuries to Persons and Property		49,131.84	.21¢
General and Miscellaneous Expenses		40,664.35	.17¢
Taxes		80,352.33	.34¢
Hire of Equipment		47,984.00	.21¢
Total Operating Expenses and Taxes (but not including any allowance for depreciation)		$750,842.84	3.18¢
Capitalization (approved by Public Service Commission, 1st Dist.):			
Capital Stock	$734,000.00		
First Mortgage 5% Bonds	1,750,000.00		
Notes Payable 5%	73,091.53		
	$2,557,091.53		
Interest on First Mortgage Bonds		145,833.34	.61¢
Interest on Notes Payable		6,974.70	.03¢
Amortization of Bond Discount		4,861.00	.02¢
Total Operating Expenses and Fixed Charges (but not including any allowance for depreciation)		$908,511.88	3.84¢
Balance—Available for Depreciation and for Return on $734,000.00 Capital Stock		$48,583.29*	

*Does not include interest earnings, amounting to $6,267.27 on deposits made by the Company.

EXHIBIT BD

Belt Line Railway Corporation

Income from Operations for the Period February 1st, 1919, to September 30th, 1920

Revenues:

Passenger revenue:	59th street	West Belt	East Belt	Total passengers		Per pass.
Passengers @ 5¢	9,846,013	1,410,848	7,500	11,264,361	$563,218.05	
" " 2¢, 3rd Avenue	2,279,605	.....	....	2,279,605	45,592.10	
42nd St. ..	2,840,068	.....	....	2,840,068	56,801.36	
N. Y. Rys.	10,304,048	.....	....	10,304,048	206,080.96	
2nd Avenue	2,772,082	.....	....	2,772,082	55,441.64	
Free Transfers	581,244	182,597	660	764,501	.....	
Total Passengers	28,623,060	1,593,445	8,160	30,224,665	$927,134.11	
Advertising					14,635.03	
Rent of Buildings & Other Property					36,641.27	
Rent of Tracks & Terminals					2,125.00	
Rent of Equipment					1,100.00	
Total Revenue					$981,635.41	

Operating expenses (not including any allowance for depreciation):

Maintenance of Way & Structures	$132,626.78	.44¢
Maintenance of Equipment	85,005.36	.28¢

Power Supply		81,428.08	.27¢
Operation of Cars		330,181.24	1.09¢
Injuries to Persons & Property		63,586.10	.21¢
General & Miscellaneous Expenses		41,430.49	.14¢
Taxes		71,658.92	.24¢
Hire of Equipment		50,915.00	.17¢
Total Operating Expenses & Taxes (but not including any allowance for depreciation)		$856,831.97	2.84¢
Capitalization (approved by Public Service Commission, 1st Dist.):			
Capital Stock	$734,000.00		
First Mortgage 5% Bonds	1,750,000.00		
Notes Payable 5%	73,091.53		
	$2,557,091.53		
Interest on First Mortgage Bonds		$145,833.34	.48¢
Interest on Notes Payable		6,244.79	.02¢
Amortization of Bond Discount		4,861.00	.02¢
Total Operating Expenses and Fixed Charges (but not including any allowance for depreciation)		$1,013,771.10	3.36¢
Balance—Available for Depreciation and for Return on $734,000.00 Capital Stock		$32,135.69*†	

*Does not include interest earnings amounting to $2,953.56 on deposits made by the Company.
[†Red in copy.]

Exhibit BE

Belt Line Railway Corporation

Income from Operations for the Year Ended June 30th, 1921

Revenues:

Passenger revenue:	59th street	West Belt	Total passengers		Per passenger
Passengers at 5¢ each	7,600,575	518,750	8,119,325	$405,966.25	
" " 2¢ " 3rd Avenue	2,239,606	.....	2,239,606	44,792.12	
" " 2¢ " 42nd Street	2,237,031	.....	2,237,031	44,740.62	
" " 2¢ " N. Y. Railway	2,556,032	.....	2,556,032	51,120.64	
" " 2¢ " 2nd Avenue	955,479	.....	955,479	19,109.58	
Free Transfers	206,051	33,685	239,736	.....	
Total	15,794,774	552,435	16,347,209	$565,729.21	
Advertising				9,174.31	
Rent of Buildings & Other Property				37,664.11	
Rent of Tracks & Terminals				750.00	
Total Revenue				$613,317.63	

Operating expenses (not including any allowance for depreciation):

Maintenance of Way & Structures	$99,737.68	.61¢
Maintenance of Equipment	55,898.11	.34¢
Power Supply	56,611.71	.35¢

Operation of Cars		221,968.60	1.36¢
Injuries to Persons & Property		39,601.01	.24¢
General & Miscellaneous Expenses		25,740.98	.16¢
Taxes		45,783.28	.28¢
Hire of Equipment		30,249.50	.18¢
Total Operating Expenses and Taxes (but not including any allowance for depreciation)		$575,590.87	3.52¢
Capitalization (approved by Public Service Commission, 1st Dist.):			
Capital Stock	$734,000.00		
First Mortgage 5% Bonds	1,750,000.00		
Notes Payable 5%	73,091.53		
	$2,557,091.53		
Interest on First Mortgage Bonds		87,500.00	.54¢
Interest on Notes Payable		3,654.60	.02¢
Amortization of Bond Discount		2,916.60	.02¢
Total Operating Expenses and Fixed Charges (but not including any allowance for depreciation)		$669,662.07	4.10¢
Balance—Available for Depreciation and for Return on $734,000.00 Capital Stock		$56,344.44*†	

*Does not include interest earnings amounting to $2,566.13 on deposits made by the Company.
[†Red in copy.]

Belt Line Railway Corporation

Income from Operations for the Year Ended June 30th, 1922

Revenues:

Passenger revenue:

59th st. line				Per passenger
8,100,009	Passengers at 5¢ each	$405,000.45		
3,308,658	" " 2¢ " (3rd Ave.)	66,173.16		
2,411,444	" " 2¢ " (42nd St.)	48,228.88		
418,988	Free Transfers	.....		
$14,239,099	Total Passengers		$519,402.49	
	Advertising		9,228.74	
	Rent of Buildings and Other Property		46,566.15	
	Rent of Tracks and Terminals		750.00	
	Total Revenue		$575,947.38	

Operating expenses (not including any allowance for depreciation):

Maintenance of Way and Structures	$43,789.63	.30¢
Maintenance of Equipment	38,868.44	.27¢
Power Supply	36,396.97	.26¢
Operation of Cars	168,841.91	1.19¢
Injuries to Persons and Property	25,970.12	.18¢

General and Miscellaneous Expenses		25,111.42	.18¢
Taxes		47,820.98	.34¢
Hire of Equipment		28,527.60	.20¢
Total Operating Expenses and Taxes (but not including any allowance for depreciation)		$415,327.07	2.92¢
Capitalization (approved by Public Service Commission, 1st Dist.):			
Capital Stock	$734,000.00		
First Mortgage 5% Bonds	1,750,000.00		
Notes Payable 5%	73,091.53		
	$2,557,091.53		
Interest on First Mortgage Bonds		87,500.00	.61¢
Interest on Notes Payable		4,538.30	.03¢
Amortization of Bond Discount		2,916.60	.02¢
Total Operating Expenses and Fixed Charges (but not including any allowance for depreciation)		$510,281.97	3.58¢
Balance—Available for Depreciation and for return on $734,000.00 Capital Stock		$65,665.41*	

4579.

*Does not include interest earnings amounting to $4,579.59 on deposits made by the Company.

Exhibit BG

Belt Line Railway Corporation

Income from Operations for the Period July 1st, 1922, to September 30th, 1922

Revenue:

Passenger revenue:

	59th st.			Per passenger
Passengers @ 5¢	1,690,229	$84,511.45		
" @ 2¢ 3rd Avenue	865,279	17,305.58		
42nd Street	561,644	11,232.88		
Free Transfers	70,985	.....		
Total Passengers	3,188,137	.....	$113,049.91	
Advertising			2,288.31	
Rent of Buildings & Other Property			8,657.85	
Rent of Tracks & Terminals			187.50	
Total Revenue			$124,183.57	

Operating expenses (not including any allowance for depreciation):

Maintenance of Way & Structures	9,390.95	.29¢
Maintenance of Equipment	7,760.04	.24¢
Power Supply	8,662.19	.27¢
Operation of Cars	40,143.25	1.26¢

Injuries to Persons & Property		6,782.99	.22¢
General & Miscellaneous Expenses		5,704.50	.18¢
Taxes		11,191.68	.35¢
Hire of Equipment		6,931.40	.22¢
Total Operating Expenses and Taxes (but not including any allowance for depreciation)		$96,567.00	3.03¢
Capitalization (approved by Public Service Commission, 1st Dist.):			
Capital Stock	$734,000.00		
First Mortgage 5% Bonds	1,750,000.00		
Notes Payable 5%	73,091.53		
	$2,557,091.53		
Interest on First Mortgage Bonds		$21,875.00	.69¢
Interest on Notes Payable		913.65	.03¢
Amortization of Bond Discount		729.15	.02¢
Total Operating Expenses and Fixed Charges (but not including any allowance for depreciation)		$120,084.80	3.77¢
Balance—Available for Depreciation and for Return on $734,000.00 Capital Stock		$4,098.77*	.12¢

*Does not include interest earnings amounting to $328.75 on deposits made by the Company.

[fol. 551]

Exhibit BH

Belt Line Railway Corporation

Statement of Income from July 1st, 1920, to September 30th, 1922, as per the Books and Reports To Public Service Commission, 1st District, and to the Transit Commission

	Year ended June 30th, 1921	Year ended June 30th, 1922	Period 3 months to Sept. 30, 1922
Revenues:			
Cash Fares	$565,729.21	$519,402.49	$113,049.91
Advertising	9,174.31	9,228.74	2,288.31
Rent of Buildings and Other Property	37,664.11	46,566.15	8,657.85
Rent of Tracks and Terminals	750.00	750.00	187.50
Total Revenues	$613,317.63	$575,947.38	$124,183.57
Operating expenses, taxes, etc.:			
Maintenance of Way and Structures	$99,737.68	$43,789.63	$9,390.95
Maintenance of Equipment	55,898.11	38,868.44	7,760.04
Depreciation	.....	47,192.55	11,111.49
Power Supply	56,611.71	36,396.97	8,662.19
Operation of Cars	221,968.60	168,841.91	40,143.25
Injuries to Persons and Property	39,601.01	25,970.12	6,782.99
General & Miscellaneous Expenses	25,740.98	25,111.42	5,704.50
Hire of Equipment	30,249.50	28,527.60	6,931.40
Taxes	45,783.28	47,820.98	11,191.68
Total Operating Expenses, Taxes, etc.	$575,590.87	$462,519.62	$107,678.49

Operating income	$37,726.76	$113,427.76	$16,505.08
Interest revenue	2,566.13	4,579.59	328.75
Gross income	$40,292.89	$118,007.35	$16,833.83
Deductions from gross income:			
Interest on First Mortgage Bonds	$87,500.00	$87,500.00	$21,875.00
Interest on Notes Payable	3,654.60	4,538.30	913.65
Amortization of Bond Discount	2,916.60	2,916.60	729.15
Total Deductions from Gross Income	$94,071.20	$94,954.90	$23,517.80
Net corporate income (Deficit in Red*)	$53,778.31*	$23,052.45	$6,683.97*

Accumulated Deficit from Operations

Period—March 22nd, 1913 to June 30th, 1920	$173,149.86
As Shown by Income Account—July 1st, 1920 to September 30th, 1922	37,409.83
Through Property Retirements, etc.	225,688.71
(Period July 1st, 1920-September 30th, 1922) Accumulated Deficit	$436,248.40

[*Red in copy.]

Exhibit BI

Dry Dock, East Broadway and Battery Railroad Company

Statement Showing Receipts and Expenses of Avenue "B" Line, Expenses Arrived at on Car-mileage Basis

Operating expenses of Dry Dock, E. B'way & B. R. R. Co.:

	3 months ended Sept. 30, 1922	Year ended June 30th 1922	1921	1920
Maintenance of Ways & Structures	$34,372.05	$102,849.68	$106,907.62	$84,160.67
Maintenance of Equipment	21,169.70	100,602.75	121,461.34	88,026.05
Power Supply	29,630.12	131,353.80	128,320.26	93,689.06
Operation of Cars	96,430.56	380,015.76	411,723.58	301,706.59
Injuries and Damages	13,700.77	64,505.81	62,999.30	45,556.09
General and Miscellaneous	8,931.04	35,705.62	27,867.45	22,273.57
Track and Terminal Privileges	4,385.20	17,516.75	17,081.15	15,212.94
Hire of Equipment	12,580.20	50,763.80	47,229.80	37,448.65
Miscellaneous Rent Deductions	68.44	344.04	344.13	344.32
Taxes	13,445.95	58,872.91	55,755.30	49,337.18
	$234,714.03	$942,530.92	$979,689.93	$737,755.12
Total mileage of Dry Dock, E. B. & B. R. R. Co.	459,323	1,778,406	1,705,851	1,276,860
Operating expenses & taxes per car mile Dry Dock, E. B'way & B. R. R. Co., cents	51.10¢	53.00¢	57.44¢	57.79¢
Receipts of Avenue "B" Line	$71,472.40	$259,791.95	$239,801.15	$185,556.30
Car mileage Avenue "B" Line	141,850	517,602	483,328	431,992
Receipts per car mile, Avenue "B" Line, cents	50.38¢	50.18¢	49.62¢	42.95¢

[fol. 553] EXHIBIT B J

Petition of Belt Line Railway Corporation to Public Service Commission, dated October 1, 1919, together with revised page No. 1 and revised page 9 of the tariff of said company thereto annexed.

Belt Line Railway Corporation

2396 Third Avenue, New York

October 1st, 1919.

To the Public Service Commission, First District, State of New York, 49 Lafayette Street, New York City:

The Belt Line Railway Corporation, by Edward A. Maher, Jr., its Vice-President, hereby applies under Section 29 of the Public Service Commission Law, for an Order granting permission to put into effect immediately after publication at stations and filing with the Commission, the following changes in its Tariff B. L. Ry. Corpn. No. 1 revised:

"Page 1—Table of Contents."
"Page 9—59th Street Crosstown Line Continued."

The proposed amendment will provide for the discontinuance of transfers between the 59th Street Crosstown Line of this Company and the Eighth Avenue Line of the New York Railways Company, the Sixth and Amsterdam Avenue Line of the New York Railways [fol. 554] Company and the Broadway and Columbus Avenue Line of the New York Railways Company and is intended to be published in Tariff B. L. Ry. Corpn. No. 1 revised, and will superseded and take the place of like amended sheets which are set forth in Tariff B. L. Ry. Corpn. No. 1, revised, on file with the Commission.

This application is based on the following special circumstances and conditions; The Eighth Avenue Railway Company has issued a notice that on and after October 1st, 1919, it will not issue to, or receive transfers from cars operated by any other company than itself. The effect of such notice being that if this company continues the issuance of transfers from its 59th Street Crosstown Line to the above named lines, such transfers will not be accepted for transportation on the above mentioned lines with the possibility of confusion to the public and the involving of this company in unwarranted and unnecessary litigation.

It being the desire of this Company to have its tariff conform to the actual operating conditions, this application for a change in the tariff to become effective immediately, is made.

Belt Line Railway Corporation, by Edward A. Maher, Jr., Vice President.

[fol. 555]
Belt Line Railway Corporation
2396 Third Avenue
New York City

B. L. Ry. Corpn.—No. 1 revised

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8	Route sheet, 59th Street Crosstown line...	Original
9	Route sheet, " " " " continued ..... October 1, 1919	[August 31, 1919]*

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Page No. 1

Issued [July 31],* 1919 October 1	Change in transfer points [Discontinuance of East Belt Line]*	Effective [August 31],* 1919

[fol. 556]

Belt Line Railway Corporation
2396 Third Avenue
New York City

B. L. Ry. Corpn. No. 1 revised

[*Words and figures enclosed in brackets erased in copy.]

59th Street Crosstown Line—Continued

Transfer points—westbound and eastbound:

At 59th Street and 1st Avenue.....	North on 1st Avenue line of the Second Avenue Company.
At 59th Street and 2d Avenue.....	North or south on 2d Avenue line of the Second Avenue Company.
At 59th Street and 3d Avenue.....	North or south on 3d and Amsterdam Avenues line of the Third Avenue Company.
At 59th Street and Lexington Avenue	North or south on Lexington Avenue line of the New York Company.
At 59th Street and Madison Avenue	North or south on 4th and Madison Avenue line of the New York Company.
At 59th Street and 6th Avenue.....	South on 6th Avenue line of the New York Company.
At 59th Street and 7th Avenue.....	South on 7th Avenue line of the New York Company.
	South on Broadway line of the New York Company.
At 59th Street and Broadway.....	North or south on Broadway line of the 42d Street Company.
[At 59th Street and 8th Avenue.....	North or south on 8th Avenue line of the New York Company.]*
[At 59th Street and 9th Avenue.....	North or south on 6th and Amsterdam Avenue line and Broadway and Columbus Avenue line, both of the New York Company.]*
At 59th Street and 10 Avenue.....	North or south on 10th Avenue line of the 42d Street Company.
At 10th Avenue and 54th Street....	South on West Belt Line of the Belt Line Company.

Page No. 9

Issued [July 31,]* 1919 October 1,	Change in transfer points	Effective [August 31,]* 1919 October 1,

[*Words and figures enclosed in brackets erased in copy.]

[fol. 557] EXHIBIT BK

Petition of Belt Line Railway Corporation to Public Service Commission, Verified February, 1920, Together with Revised Page No. 1 And Revised Page No. 9 of the Tariffs of the said Company Thereto Annexed.

Belt Line Railway Corporation, 2396 Third Avenue, New York

February 20, 1920.

To the Public Service Commission, First District, State of New York, 49 Lafayette Street, New York City:

The Belt Line Railway Corporation, by Walter C. Burrows, its Secretary, hereby applies under Section 29 of the Public Service Commission law, for an order granting permission to put into effect upon less than thirty days notice and filing with the Commission, the following changes in its Tariff B. L. Ry. Corpn., # 1, revised:

Page 1—Table of Contents.
Page 9—59th Street Crosstown line, continued.

The proposed amendment will provide for the discontinuance of transfer between the 59th Street Crosstown Line of this Company, and the Fourth and Madison Avenues Line of the New York and Harlem Railroad Company, and is intended to be published in Tariff B. L. Ry. Corpn. #1, revised, and will supersede and take the place of like amended sheets which are set forth in Tariff B. L. Ry. Corpn. #1, revised, on file with the Commission.

[fol. 558] This application is based upon the following special circumstances and conditions:

The New York and Harlem Railroad Company has notified this Company that on and after March 1, 1920, the New York and Harlem Railroad Company will refuse to accept transfers from the 59th Street Crosstown Line of this Company. The effect of such notice is that if this Company continues the issuance of transfers from its 59th Street Crosstown cars to the above named line of the New York and Harlem Railroad Company after March 1, 1920, such transfers will not be accepted for transportation on the above mentioned line of said New York and Harlem Railroad Company. Such a situation would lead to confusion to the public and might involve this Company in unwarranted and unnecessary litigation for issuing worthless transfers. It is desirable to avoid such a situation and to have this Company's Tariff conform with the actual operating conditions as they will exist from and after March 1, 1920, and, therefore, this Company respectfully submits that the proposed change in Tariff, herein set forth, should become effective March 1, 1920.

Belt Line Railway Corporation, by Walter C. Burrows, Secretary.

[fol. 559] BELT LINE RAILWAY CORPORATION

B. L. RY. CORPN.

2396 Third Avenue
New York City.

No. 1 revised.

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6	Route sheet, West Belt Line	December 18, 1919
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8	Route sheet, 59th Street Crosstown Line.	Original
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Standard rates and terms and conditions of service See Route Sheets

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[*Words and figures enclosed in brackets erased in copy.]

Transfer points..... See Route Sheets
Transfer Rules 2

Page No. 1

Issued [November 18, 1919]* Changes in [Operated Route and]*
February 20, 1920
transfer Points, Effective [December 18,]* 1919.
March 1, 1920.

BELT LINE RAILWAY CORPORATION B. L. RY. CORPN.

[fol. 560] 2396 Third Avenue No. 1 revised
New York City.

59th Street Crosstown Line—Continued.

Transfer points—westbound and eastbound:

At 59th Street and 1st Avenue.....North on 1st Avenue line of the Second Avenue Company.

At 59th Street and 2nd Avenue.....North or south on 2d Avenue line of the Second Avenue Company.

At 59th Street and 3rd Avenue .....North or south on 3d and Amsterdam Avenue line of the Third Avenue Company.

At 59th Street and Lexington Avenue.....North or south on Lexington Avenue line of the New York Company.

[At 59th Street and Lexington Avenue.....North or south on 4th and Madison Avenue line of the New York Company.]*

At 59th Street and 6th Avenue ..... South on 6th Avenue line of the New York Company.

At 59th Street and 7th Avenue ..... South on 7th Avenue line of the New York Company.
South on Broadway line of the New York Company.

At 59th Street and Broadway ..... North or south on Broadway line of the 42d Street Company.

[*Words and figures enclosed in brackets erased in copy.]

At 59th Street and 10th Avenue ..... North or south on 10th Avenue line of the 42nd Street Company.

Page No. 9

Issued [November 18, 1919].* February 20, 1920.
Effective [December 18, 1919].* March 1, 1920.

Change in Transfer Points.

[fol. 561] EXHIBIT BL

Third Avenue Railway System, Legal Department, 130th Street 3rd Avenue New York

May 22, 1920.

Mr. James B. Walker, Secretary Public Service Commission, 49 Lafayette Street, New York City.

DEAR SIR: I transmit herewith for filing with your Commission, five (5) copies of first revised pages Nos. 2 and 3, and second revised page No. 9 of Belt Line Railway Corporation tariff.

Yours very truly, Alfred T. Davison, General Counsel, by Addison B. Scoville, Assistant Attorney.

[fol. 562] Belt Line Railway Corporation
2396 Third Avenue
New York City.

B. L. Ry. Corpn. No. 1
Revised.

PRELIMINARY STATEMENT

Belt Line Railway Corporation operates routes of street surface railway in the Borough of Manhattan. The routes operated are described in the route sheets, pages 4 to 9 inclusive. The routes are alphabetically arranged and are each described in detail as to point of beginning and termination; the streets, avenues and highways operated over; the points at which passengers on the cars of the Company are transferred to other lines of this Company and to the lines of other companies; the mileage operated; the motive power; the hours during which service is furnished; the sub-routes, if any, operated.

This tariff is a local and point passenger tariff and is issued by Belt Line Railway Corporation. Belt Line Railway Corporation interchanges and transfers passengers between its own lines and certain lines of the following named carriers:

The Dry Dock, East Broadway and Battery Rail Road Company.
The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company.
New York Railways Company.
Third Avenue Railway Company.

[*Words and figures enclosed in brackets erased in copy.]

The joint fares charged passengers for such transportation is five cents, and this Company's transfer is accepted for transportation by the joint carriers. The points at which transfers are issued to such joint carriers are set forth in the route sheets, pages 4 to 9 inclusive.

Certain rules, regulations, rates of fare, standard rates and terms and conditions of service apply to all of the routes operated by this Company and are stated below. Being of general application to all of the routes they are not repeated in the route sheets.

Rates of Fare. The cash fare between any two points on the same line; or, by transfer, between any point on one line and points on other lines of this Company; or, by transfer, between any point on one line of this Company and points of certain lines of other companies as shown by transfer points in the route sheets, pages 4 to 9 inclusive, is five cents. Children under four years of age are carried free if accompanied by an adult. Uniformed members of the Police Department and the Fire Department are carried free, not to exceed two such officers of any one car. Officers in excess of the above number are required to pay cash fares.

General rules regarding collection of cash fares and issuance and receipt of transfers: Conductors are not required to make change for a bill of larger denomination than two dol-

Page No. 2.

Issued May 22, 1920. Effective June 22, 1920.

Change in Transfer Privilege.

[fol. 563] Belt Line Railway Corporation
2396 Third Avenue
New York City.

B. L. Ry. Corpn. No. 1
revised

lars, but may do so if convenient. Transfers are issued by conductors to cash fare passengers only upon request at the time such cash fare is paid. Transfers are good for a continuous trip in the general direction indicated only when presented at the transfer point within the time limit indicated upon the transfer. Transfers are good only on the date indicated thereon and are not transferable. Mutilated transfers or transfers punched for more than one time limit are not accepted for transportation. Transfers are not issued as a stop-over privilege and are not issued from car to car of the same line except in case of emergency. Lines operating over a joint route between a terminus and junction, neither issue to, nor accept transfers from each other while in the joint portion of the route. Transfers are in the form of a ticket with coupons attached. They are accepted for transportation on any line named upon the ticket or the coupons at points of intersection with the issuing line, or from a line named on one coupon to a line named on the ticket or another coupon at the points of intersection. If a passenger desires to transfer from the issuing line to a line named on the first coupon the transfer with coupons attached is surrendered to the conductor of the car transferred to. If it is desired to continue the trip by still another line the transfer is retained, only the coupon being collected by the con-

ductor, the passenger retaining the transfer ticket for use in making the second transfer.

Abbreviations: Certain abbreviations are made in the route sheet as follows:

Belt Line Railway Corporation is herein called "the Company" or "this Company."
Third Avenue Railway Company is herein called "the Third Avenue Company."
The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company is herein called "the 42d Street Company."
The Dry Dock, East Broadway and Battery Rail Road Company is herein called "the Dry Dock Company."
Mid-Crosstown Railway Company, Inc., is herein called "the Mid-Crosstown Company."
New York Railways Company is herein called "the New York Company."
The Public Service Commission for the First District State of New York, is herein called "the Commission."

Baggage and Bundles: Hand baggage and personal effects of passengers are carried free when not bulky or prohibited by law. Animals, such as cats, dogs, etc. will not be carried on the cars of this Company.

Issued May 22, 1920. Change in Abbreviations. Effective June 22, 1920

[fol. 564] Belt Line Railway Corporation
2396 Third Avenue
New York City.

B. L. Ry. Corpn. No. 2
revised

59th Street Crosstown Line—continued

Transfer Points—westbound and eastbound:

At 59th Street and 1st Avenue..	South on Avenue B line of the Dry Dock Company.
At 59th Street and 3d Avenue ..	North or south on 3d and Amsterdam Avenues Line of the Third Avenue Company.
At 59th Street and Broadway..	North or south on Broadway line of the 42d Street Company.
At 59th Street and 10th Avenue	North or south on 10th Avenue line of the 42d Street Company.

Page No. 9.

Issued May 22, 1920. Effective June 22, 1920.

Change in Transfer Points

[fol. 565] EXHIBIT BM

STATE OF NEW YORK:

Public Service Commission for the First District

In the matter of the application of the BELT LINE RAILWAY CORPORATION for an order modifying the order of the Public Service Commission, First District, dated October 29th, 1912, so that the exchange of transfers between the lines operated by the Belt Line Railway Corporation and the lines operated by all other street-surface railway corporations named in said order dated October 29th, 1912, with the exception of Third Avenue Railway Company and The Forty-second Street, Manhattan & St. Nicholas Avenue Railway Company, shall be discontinued.

To the Public Service Commission of the State of New York for the First District:

The petition of Belt Line Railway Corporation respectfully shows:

I. Your petitioner is a street railroad corporation, organized and doing business under the laws of the State of New York, and owning and operating a street railroad on 59th Street, Borough of Manhattan, between First and Tenth Avenue and other streets and avenues in the Borough of Manhattan, City and State of New York, by reason of being vested with the property rights, privileges and franchises appertaining thereto, formerly belonging to the Central Park, North and East River Railroad Company.

II. That heretofore and on or about the 29th day of October, 1912, the Public Service Commission of the State of New York, First District, made an order dated on that day, in Case No. 1364, requiring certain railroad corporations therein mentioned, including the Central Park, North and East River Railroad Company, the predeces- [fol. 566] sor of your petitioner, to put in force, and maintain, certain through routes and joint rates, fares and charges, for transportation of passengers in the City of New York, to which order on file with this Commission, reference is hereby made as though the same were herein set forth in full.

III. That thereafter, pursuant to the directions contained in said order, dated October 29th, 1912, the Central Park, North and East River Railroad Company, and your petitioner, as the successor thereof, exchanged and still continue to exchange, transfers without any extra charge, with the other street surface railroad corporations named in said order, except that ever since the 1st day of October 1919, no transfers have been exchanged between your petitioner and the Eighth Avenue Railroad Company, and between your petitioner and the Ninth Avenue Railroad Company, for the reason that prior to said 1st day of October, 1919, said Eighth Avenue Railroad Company and said Ninth Avenue Railroad Company gave

notice to the public that after said October 1, 1919, neither of them would thereafter accept on their lines, transfers issued by your petitioner, and that neither of them would thereafter give transfers to the lines of your petitioner; and also except that ever since the 1st day of March, 1920, no transfers have been exchanged between your petitioner and the New York & Harlem Railroad Company (operating the line known as the Madison Avenue Line), for the reason that prior to said 1st day of March, 1920, the New York & Harlem Railroad Company gave notice to the public that after said March 1, 1920, it would no longer accept transfers from the lines of your petitioner, and would no longer issue transfers to the lines of your petitioner.

IV. That the transfers given and received by your petitioner pur- [fol. 567] suant to said order, dated October 29th, 1912, are given on the receipt by the issuing company of a fare of five cents, and no more, which said fare of five cents constitutes the joint rate or charge over the through routes established between the lines of the companies as set forth in said order dated October 29th, 1912, and the said joint rate or charge of five cents is apportioned between your petitioner and the other street surface railroad corporations exchanging transfers, as provided in said order dated October 29th, 1912, on the basis of two cents to your petitioner, and three cents to some one of the other street railroad corporations named in said order, irrespective of whether your petitioner originally collects a five cent fare or carries a passenger on a transfer issued by one of the other companies named in said order dated October 29, 1912.

V. There is no requirement in any franchise or consent under which your petitioner is operating its said street surface railways in the City of New York, nor in any contract with the City of New York, whereby your petitioner is required to exchange transfers at any of the points mentioned in said order dated October 29th, 1912, but said transfers are exchanged solely by reason of the said order dated October 29th, 1912.

VI. That the joint rate or fare established by said order of this Commission dated October 29th, 1912, is unreasonable, confiscatory and insufficient to yield reasonable compensation to your petitioner for the service rendered, as shown by the following:

(1) The actual operating cost to your petitioner for the transportation of each passenger over its lines, excluding any charge for depreciation, or for fixed charges or return on capital invested, is [fol. 568] 2.88 cents, as shown by Schedule A hereto annexed and hereby made a part of this petition, whereas your petitioner, as hereinabove shown, receives only two cents for carrying each passenger on the joint rate of fare fixed by the order of this Commission dated October 29, 1912; and the actual cost for the transportation of each passenger, including interest paid on funded debt, and without any allowance for depreciation or return on capital invested, other than such capital represented by funded debt, is 3.41 cents, as shown by

Schedule A hereto annexed, whereas as heretofore stated, your petitioner only received two cents for carrying each passenger on said joint rate of fare, thus showing a loss on such computation of 1.41 cents per joint rate passenger.

The capitalization of your petitioner is only such as has been authorized and approved by this Commission, as follows:

Capital Stock

Issues authorized by Public Service Commission, as follows:

March 19, 1913—Case #1606...	$431,300.00	
July 22, 1913—Case #1703.....	49,700.00	
Nov. 7, 1913—Case #1723.....	253,000.00	
Total		$734,000

First Mortgage Bonds

Authorized by Public Service Commission March 19, 1913, Case #1606.....	$1,750,000

Notes Payable

Issued to refund construction advances authorized by Public Service Commission—Case #1778....	73,091.53
Total	$2,557,091.53

[fol. 569] In computing the cost of transportation of each passenger at 3.41¢ as shown in Schedule A hereto annexed, the only deductions made for interest on funded debt are the following:

Interest at 5% per annum on $1,750,000 of First Mortgage Bonds	$87,500.
Interest at 5% per annum on $73,091.53 of Notes Payable	3,654.57

and the loss to your petitioner is actually much more than the 1.41 cents per passenger shown by the computation set forth in Schedule A, for the reason that such computation does not include any return on the investment represented by the capital stock as authorized and approved by this Commission, and does not include any allowance whatsoever for depreciation and only includes a return of five per cent on the funded debt authorized and approved by this Commission.

(2) During the year ended June 30, 1919, your petitioner carried 5,440,776 passengers from whom it received a five cent fare, making a total revenue from five cent fares of $272,038.30, and during the same period your petitioner carried 12,817,674 passengers from whom it only received a two cent fare, making a total revenue from

two cent fares of $256,353.48 (all of said 12,817,674 passengers being passengers carried over the joint route established by said order dated October 29th, 1912, for the transportation of each of which passengers your petitioner only received two cents.)

(3) During the nine months ended March 31st, 1920, your petitioner carried 5,172,175 passengers from whom it received a five cent fare, making a total revenue from five cent fares of $258,608.75, and during the same period your petitioner carried 7,763,634 passengers from whom it only received a two cent fare, making a total revenue from two cent fares of $155,272.68 (all of said 7,763,634 [fol. 570] passengers being passengers carried over the joint route established by said order dated October 29th, 1912, for the transportation of each of which passengers your petitioner only received two cents.)

VII. That on the 11th day of May, 1920, Job E. Hedges, as Receiver of the New York Railways Company, filed with your Commission, his petition praying that your Commission relieve him as Receiver aforesaid, of the requirements of the order of this Commission, dated October 29th, 1912, insofar as it requires the issuance and acceptance of transfers between the lines of the New York Railways Company, and the 59th Street Crosstown Line of your petitioner. Your petitioner does not oppose the said application of Job E. Hedges, as Receiver of the New York Railways Company, but on the contrary joins therein.

The granting of said application will still leave a joint rate of fare between the line of your petitioner on 59th Street, and the lines of the Second Avenue Railroad Company in the City of New York, from which rate or fare your petitioner is only receiving two cents per passenger, whereas, as heretofore set forth, it is actually costing your petitioner in excess of 3.41¢ per passenger, not including any deduction for depreciation and not including any return on capital invested, as approved by this Commission, excepting the interest at five per cent on funded debt.

Wherefore your petitioner

(1) Joins in the application of Job E. Hedges, as Receiver of New York Railways Company, as set forth in his petition verified May 11th, 1920, and filed herein on May 11th, 1920; and

[fol. 571] (2) Respectfully prays for an order modifying the order of this Commission, dated October 29th, 1912, so that the exchange of transfers between the lines operated by the Belt Line Railway Corporation and the lines operated by all other street surface railway corporations, named in the order dated October 29th, 1912, with the exception of the Third Avenue Railway Company, and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, shall be discontinued.

Respectfully submitted, Belt Line Railway Corporation, by
(Signed) Leslie Sutherland, Vice President.

[fol. 572] STATE OF NEW YORK,
County of New York, ss:

Leslie Sutherland, being duly sworn, deposes and says that he is Vice President of the Belt Line Railway Corporation, the corporation named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and the same is true to his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. That the reason why this verification is made by deponent is because the petitioner is a corporation; and the sources of deponent's information and the grounds of his belief as to all matters not stated upon his knowledge are information acquired by deponent in the course of his duties as an officer of the petitioner.

(Signed) Leslie Sutherland.

Sworn to before me this 18th day of May, 1920. H. S. Jefferds, Notary Public, Kings County, No. 55. Certificate filed in Kings County. Register's Office No. 1008. Certificate filed in New York County No. 11. Certificate filed in New York County Register's Office No. 1136. Certificate filed in Bronx County No. —. Certificate filed in Bronx County Register's Office No. —. Commission expires March 30, 1921.

Schedule A

Belt Line Railway Corporation

Income from Operations for the Period of Nine Months Ended March 31st, 1920

			Per passenger
Revenues:			
Passenger revenue:			
5,172,175 passengers at 5¢	$258,608.75		5.00¢
7,763,634 " " 2¢ (Joint Rate)	155,272.68		2.00¢
446,324 transfers (not covered by Joint Rate)	.....		
13,382,133 total passengers		$413,881.43	
Advertising		6,550.56	
Rent of Buildings and other property		15,450.00	
Rent of Tracks and Terminals		812.50	
Rent of Equipment		200.00	
Total Revenues		$436,894.49	
Operating expenses, taxes, etc. (not including any allowance for depreciation):			
Maintenance of Way and Structures		$60,466.54	.45¢
Maintenance of Equipment		39,299.19	.29¢
Power Supply		36,454.59	.27¢
Operation of Cars		147,899.06	1.11¢
Injuries to Persons and Property		28,971.67	.22¢
General and Miscellaneous		17,563.46	.13¢
Hire of Equipment		22,962.50	.17¢
Taxes		32,123.28	.24¢
Total Operating Expenses and Taxes (but not including any allowance for depreciation)		$385,740.29	2.88¢

Income from Operations—Continued

			Per passenger
Capitalization approved by Public Service Commission, 1st Dist.:			
Capital Stock	$734,000.00		
First Mortgage 5% Bonds	1,750,000.00		
Notes Payable 5%	73,091.53		
	$2,557,091.53		
Interest on First Mortgage Bonds		$65,625.00	.51¢
Amortization of Bond Discount		2,187.45	
Interest on note at 5%		2,740.95	.02¢
Total operating expenses and fixed charges (but not including any allowance for depreciation)		$456,293.69	3.41¢
Balance—available for depreciation and for return on $734,000.00 capital stock (deficit) (nine months' period)		$19,399.20	

EXHIBIT BN

Third Avenue Railway System, Avenue "B" Line

Tabulation of passenger check made on Wednesday and Thursday, June 14th and 15th, 1922, at Clinton & Delancey Sts., First Ave. and 15th St., and First — and 42nd St., Avenue "B" Line, north bound.

Time	Clinton & Delancey			First Ave. & 15th St.			First Ave. & 42d St.		
	6/14/22	6/15/22	Aver.	6/14/22	6/15/22	Aver.	6/14/22	6/15/22	Aver.
6.00- 7.00	127	133	130	119	179	149	125	125	125
A. M.:									
7.00- 8.00	238	224	231	350	370	360	147	188	167
8.00- 9.00	184	178	181	212	189	200	61	81	71
9.00-10.00	161	154	158	162	208	185	52	55	53
10.00-11.00	177	176	176	149	161	155	76	66	71
11.00-12.00	245	186	217	113	140	127	59	54	56
Noon:									
12.00- 1.00	231	264	248	127	148	137	65	66	65
P. M.:									
1.00- 2.00	289	279	284	254	271	263	89	84	86
2.00- 3.00	275	269	272	196	243	220	88	99	94
3.00- 4.00	284	322	303	187	171	179	110	106	108
4.00- 5.00	340	324	332	176	122	149	158	152	155
5.00- 6.00	615	563	589	162	161	161	158	187	173
6.00- 7.00	666	598	632	175	131	153	111	78	94
7.00- 8.00	377	385	381	116	115	115	102	77	89
8.00- 9.00	235	221	228	120	102	111	59	50	55
9.00-10.00	159	175	167	62	78	70	44	47	45
10.00-11.00	148	132	140	110	92	101	27	32	30
11.00-12.00, Mid.	80	85	82	45	54	49	26	26	26
Totals	4,834	4,668	4,751	2,835	2,935	2,885	1,557	1,573	1,565

Exhibit BO

Avenue 'B' Line

Tabulation of passenger check made on Wednesday and Thursday, November 8th and 9th, 1922, at Clinton & Delancey Sts., First Ave. & 15th St., and First Ave. & 42d St. on the Avenue 'B' Line, north bound.

	Clinton & Delancey Sts.			First Ave. & 15th St.			First Ave. & 42d St.		
	11/8/22	11/9/22	Aver.	11/8/22	11/9/22	Aver.	11/8/22	11/9/22	Aver.
6- 7 A. M.	112	126	119	164	189	176	35	60	48
7- 8 A. M.	285	249	257	368	374	371	72	85	78
8- 9 A. M.	222	184	203	157	163	160	36	37	37
9-10 A. M.	200	171	185	164	171	168	58	41	50
10-11 A. M.	212	172	192	138	131	134	51	60	55
11-12	228	215	221	144	142	143	63	59	61
Noon:									
12- 1 P. M.	279	194	236	159	174	166	70	69	70
1- 2 P. M.	291	242	266	225	250	238	40	65	52
2- 3 P. M.	310	272	291	174	211	192	62	50	56
3- 4 P. M.	338	290	314	278	169	223	96	72	84
4- 5 P. M.	336	329	333	137	137	137	109	101	105

EXHIBIT BP

Belt Line Railway Corporation

Statement Showing Income from Operations for Period February 1st, 1921, to September 30th, 1922, as Compared with Income for Same Period Adj
Cent Passengers as Were Actually Carried During the Period February 1st, 1919, to Sept

Revenue:

Passenger revenue:

59th Street	West Belt	Total		Actual income	59th Street	West Belt	Total	
13,426,836	77,735	13,504,571	Passengers at 5 cents.		9,846,013	77,735	9,923,748	Pas
9,560,290	....	9,560,290	Passengers at 2 cents.		18,195,803	.....	18,195,803	Pas
563,580	2,640	566,220	Free Transfers.		563,580	2,640	566,220	Fre
23,550,706	80,375	23,631,081	Total Passengers	$866,434.35	28,605,396	80,375	28,685,771	Tot
			Advertising	15,440.04				
			Rent of Buildings and other property	73,970.78				
			Rent of Tracks and Terminals	1,250.00				
			Total Revenue	$957,095.17				

Operating expenses (not including any allowance for depreciation):

Maintenance of Way and Structures	$103,729.90	
Maintenance of Equipment	67,057.77	
Power Supply	64,217.51	
Operation of Cars	297,705.14	
Injuries to Persons and Property	49,131.84	
General and Miscellaneous Expenses	40,664.35	
Taxes	80,352.33	
Hire of Equipment	47,984.00	
Total Operating expenses and Taxes (not including any allowance for Depreciation)	$750,842.84	
Interest on First Mortgage Bonds	145,833.34	
Interest on Notes Payable	6,974.70	
Amortization of Bond Discount	4,861.00	
Total Operating Expenses and Fixed Charges (not including any allowance for Depreciation)	$908,511.88	3.84¢ per Passenger.
Balance—Available for Depreciation, and for Return on $734,000 Capital Stock	*$48,853.29	

*Does not include interest earnings, amounting to $6,267.27 on deposits made by the Company.

[†Red in copy.]

‡The number of passengers carried on Fifty-ninth Street Line, during the period February 1st, 1919, to September 30th, 1920, was 21% in excess of the number of pass
September 30th, 1922. The operating expenses for last named period, amounting to $750,842.84 has therefore been increased 21%, giving an adjusted operating expense amou
ance for depreciation.

Exhibit BP

Belt Line Railway Corporation

st, 1921, to September 30th, 1922, as Compared with Income for Same Period Adjusted on the Basis of Carrying the Same Number of Five Cent and Two ngers as Were Actually Carried During the Period February 1st, 1919, to September 30th, 1920

	Actual income	59th Street	West Belt	Total		Adjusted income	
cents.		9,846,013	77,735	9,923,748	Passengers at 5 cents.		
cents.		18,195,803	.....	18,195,803	Passengers at 2 cents.		
		563,580	2,640	566,220	Free transfers.		
es	$866,434.35	28,605,396	80,375	28,685,771	Total Passengers	$860,103.46	
.....	15,440.04					15,440.04	
.....	73,970.78					73,970.78	
.....	1,250.00					1,250.00	
.....	$957,095.17					$950,764.28	
.....	$103,729.90						
.....	67,057.77						
.....	64,217.51						
.....	297,705.14						
.....	49,131.84						
.....	40,664.35						
.....	80,352.33						
.....	47,984.00						
y allowance for	$750,842.84					#$908,519.83	
.....	145,833.34					145,833.34	
.....	6,974.70					6,974.70	
.....	4,861.00					4,861.00	
ing any allow-	$908,511.88	3.84¢ per Passenger.				$1,066,188.87	3.72¢ per Passenger.
ital Stock.....	*$48,853.29					*†$115,424.59	

by the Company.

period February 1st, 1919, to September 30th, 1920, was 21% in excess of the number of passengers carried on the Fifty-ninth Street line, during the period February 1st, 1921, to g to $750,842.84 has therefore been increased 21%, giving an adjusted operating expense amounting to $908,519.83. Neither actual or adjusted operating expense includes any allow-

5- 6 P. M.	623	576	600	193	150	172	154	152	153
6- 7 P. M.	683	657	670	141	83	112	102	76	89
7- 8 P. M.	305	367	336	91	104	97	27	55	41
8- 9 P. M.	187	280	234	97	86	91	54	38	46
9-10 P. M.	144	181	162	51	76	63	22	39	30
10-11 P. M.	156	116	136	64	52	58	20	27	23
11-12, Mid.	49	46	47	15	48	31	14	13	14
Totals	4,906	4,667	4,813	2,760	2,710	2,735	1,085	1,099	1,092

Weather: Wednesday. Warm & Clear. Light shower at 6.00 P. M. Thursday. Cool & Clear.
11/14/22. J. F. D.

(Here follows Exhibit BP, marked side folio page 576)

[fol. 577]

Exhibit BQ

Belt Line Railway Corporation

Statement Showing 1922 Material and Labor Costs Compared with 1913 Material and Labor Costs

	1913	1923	Per cent increase 1922 compared with 1913
Cost of D. C. power—per D. C. K. W. H.	$.012	$.0172	43%
Roadway and track:			
Ties—each	.87	1.56	79%
Rails—per ton	38.90	44.80	15%
Paving—sq. yard—granite block	3.50	7.00	100%
asphalt	2.25	3.50	55%
Wood block	3.00	6.00	100%
Labor—average per day	2.17	4.20	94%
Maintenance of equipment:			
Steel Wheels—each	13.00	25.00	92%
Iron " —C lbs.	1.375	1.40	1%
Lumber—M ft.	85.00	110.00	29%
Axles—C lbs.	2.49	3.90	57%
Brake Shoes—Ton	36.00	66.00	83%
Glass—Box	3.82	6.38	67%
Labor—Average per Day	2.09	4.65	122%
Wages of conductors:			
Cents per Hour	24–27	45–61	96%*
Wages of motormen:			
Cents per Hour	25–28½	45–61	80%*

[fol. 578]

Exhibit BR

Memorandum from Mr. Madden Giving Items Included under "Land and Buildings" and "Electrical and Mechanical Equipment"

Transit Commission

Copies sent to —— ——.
Ordered filed by —— ——.
Filed: —— —, ——.
Date: November 22, 1922.

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*Based on wages paid first year men.

From: John H. Madden, Valuation Engineer.
To: George H. Stover, Assistant Counsel.
Subject: Belt Line Railway Corporation.

Pursuant to the request of Judge Lacombe during my testimony before him yesterday respecting the property included in the valuation by the Commission as owned by the Belt Line Railway Corporation, listed below are the items included under Land, under Buildings and under Electrical and Mechanical Equipment.

Land: 4th Ward, Block 1082, Lot #14—West Side of 10th Avenue from 53rd to 54th Streets.

Buildings: 3 Story Brick used as Car House and Storage Battery Station, located on above property.

Electrical & Mechanical Equipment: Sub-Station, 54th Street & 10th Ave.

2 G. E. 200 K. W. Rotaries.
6 G. E. 85 K. V. A. Rotary Transformers.
6 G. E. Current Transformers (Type K).
2 Westinghouse 500 Amp. Oil Switches.
2 " 300 " " "
Oil Switch Compartments (Brick) 1053 Cu. Ft. (Over Volume).
21 Westinghouse 300 Amp. Disconnecting Switches.
Copper Bus—All sizes—1,560 Pounds.
Cable—2/0 V. C. D. B. 60 ft.
" —½ M-R. C. D. B. 3/0 Ft.
Bus & Cable Support.
Conduit & Control Support.

Switchboards: 1 A. C. Feeder Panel, 2 A. C. Rotary Panels, 2 Trans. Sec. Panels, 12 Battery Charge Panels, 2 D. C. Rotary Panels.

[fol. 579] I will assume that you will see that this information is presented to Judge Lacombe and that my services will not be required in that connection unless you advise me to the contrary.

(Signed) John H. Madden, Valuation Engineer.

[fol. 580] EXHIBIT BS

Report on the Valuation of Transit Properties in Greater New York Made by John H. Madden, Valuation Engineer, to the Transit Commission, Dated February 15, 1922

NOTE.—This exhibit consists of a volume of 380 pages containing tables and charts showing appraisals of the properties of all the transit lines in Greater New York and is therefore, not printed herein in full. The parts thereof relating to the Belt Line Railway Corporation are set out hereinafter in summarized form. A notation at the foot of each summary gives the page of the report from which it was taken.

[fol. 581] Exhibit BS (continued)

Report on the Valuation of Transit Properties—Greater New York

The legislation enacted by the State of New York creating the Transit Commission contains provision that such Commission shall prepare a plan of readjustment for the improvement of transit in Greater New York, which shall accomplish "the combination rehabilitation, improvement and extension of existing railroads so that service thereon may be increased and improved to the fullest extent possible," and that (Chapter 355 of the laws of 1921, Section 106 of Article VI).

"In connection with the preparation of such plan the Commission shall cause a valuation to be made of the property, other than franchises or going value, necessarily used in public service of the railroads it proposes to include therein. Such valuation shall be made with due regard to the estimated prospective earning capacity of the property necessarily used in the public service at the rate or rates of fare that the Company prior to the taking effect of this Act was entitled to charge in view of the provisions of the Contract or franchises under which the Company has operated or held or of any lawful order in force fixing or regulating rates of fare or of the competition of other lines and with due regard to all other pertinent facts and conditions; but such valuation shall not in any case exceed the fair reconstruction cost of the property less depreciation. Such valuation shall be in such detail and shall include such elements of cost or value and shall be made in such manner as the Commission may prescribe. Such valuation as finally determined by the Commission shall be the basis for all allowances to the railway companies under the plan and for thereafter fixing the returns on the property so valued."

Accordingly there have been prepared and are presented herewith as of June 30th, 1921, for each railway company or system proposed to be included in the plan of readjustment, the following:

Valuation of property, used and not used in operation—

Based on Actual or estimated original cost.

Based on Cost to Reproduce New in pre-war period (1910 to 1914).

Based on Cost to Reproduce New January to July, 1921.

Valuation of property less accrued depreciation on straight line basis—

Applied to Actual or estimated original cost.

Applied to Cost to Reproduce New pre-war period (1910 to 1914).

Applied to Cost to Reproduce New January to July, 1921.

An estimate of expenditures necessary to place the property of each company in first-class operating condition.

Statements of capitalization, book value of property and significant financial data, for each system and company.

Detailed operating statistics for each company, over a period of the past ten years.

Together with other relevant data and statistics respecting valuations and the past and present operating conditions of the railroads.

Scope of Report

This report embraces all transit companies operating within the limits of Greater New York with the exception of the Hudson & Manhattan Railway Co. and the Staten Island Rapid Transit Co. which are not included in the plan as at present being developed.

The summaries in the report include all companies in the railway systems of each Borough as constituted in 1919 before the disintegration through receivership and otherwise. The companies in each system however, which are now operated independently of the property in receivership are shown separately so that the amount of the property involved can readily be ascertained.

For purposes of convenience the report has been divided into five main parts, as follows:

Part I.—Text of Report with General Summaries of the valuations for all Companies together with Estimates of the Expenditures necessary to place the properties in first class operating condition.

Part II.—Historical data and explanatory notes pertaining to each system together with supporting summaries of the Valuations for each System and Company containing details as to quantities, costs and description of the property to permit of a ready review of the findings shown in the grand summaries in Part I.

Part III.—Unit Cost data, including graphical charts showing fluctuations in prices of labor and materials and tables showing the details supporting the unit cost prices used in the Valuations.

Part IV.—Financial data pertaining to each System and Company including Details of Capitalization; Balance Sheets; Schedules of Book Values of Fixed Capital Assets (Physical Property) and Comparative Summary Statements showing the results of operation by fiscal years from 1912 to 1921 inclusive.

Part V.—General Financial and Statistical data relative to the Capitalization and Market Values of Outstanding Securities and Operating Statistics pertaining to each System and Company.

Valuations

At the outset it will be realized that a valuation for the purpose of acquisition of railroad properties is not identical with a rate case, and the procedure to be followed is not as restricted or constrained by the technicalities which apply to determinations in these latter cases. A rate case may well involve a consideration of intangible values, which do not necessarily assume importance in the determination of a fair value for property to be acquired as used and useful for the operation of a railroad.

For the property of each company as included in this report the inventory was made as of June 30, 1921.

The railroad companies included in the valuation comprise street surface lines and rapid transit lines. The latter are the subway and elevated railways in all boroughs which are operated under the so-called "Dual Contracts" and related certificates of March 19th, 1913. (Contract No 3 and Certificate for Elevated Railroad Extensions to Interborough Rapid Transit Company, Certificates for Additional Tracks to Manhattan Railway Company. Contract No. 4 and Certificates for Elevated Railroad Extensions and Additional Tracks to New York Municipal Railway Corporation.)

The provisions in these Dual Contracts and the Related Certificates (other than the certificates to the Interborough and Manhattan companies) applying to expenditures both by the City and the Company are briefly that the Chief Engineer of the Commission shall render a determination in writing as to the cost of construction and the cost of equipment, which cost in each instance is to be based on the vouchers and the substantiated records of the actual expenditures which enter into the completed work. In the case of the Interborough and Manhattan Certificates, cost is to be agreed upon or determined by arbitration; during the course of this work records were kept substantially in the same manner as on the Dual contract work. The valuation therefore of the property included in these contracts and certificates was based upon the ascertained or determined cost and no other estimate was made as to reproduction costs or otherwise. Similarly the property furnished under the original subway contracts, known as Contracts 1 and 2, (now held by the Interborough Rapid Transit Co.) was included in the valuation at their original cost as reflected by the records in the files of the Commission.

For street surface lines and for the portion of the property and structures of the original elevated railway lines (which elevated lines form part of the system operated under the Dual Contracts, but which are not included in the determinations of cost) the valuation was developed on three bases; the valuation of all physical property based on

(a) the Original Cost or an approximation thereof;

(b) the Cost to Reproduce New at prices and conditions existing from 1910 to 1914;

(c) the Cost to Reproduce New at prices and conditions existing in the first six months of 1921.

The term "reconstruction cost" which appears in the Act as printed was held to be synonymous with "reproduction cost" as employed and understood in valuation work.

"Original Cost" represents the expenditure to produce the prop-[fol. 582] erty in its physical condition as of the date of inventory but is exclusive of such amounts as were necessarily expended during its period of service to maintain it in condition for operation. "Costs to Reproduce" represent expenditures which would have been

necessary to recreate the property at the two periods selected; the one being the period immediately preceding the World War, when this country was enjoying a normal measure of prosperity and prices and conditions were in accord therewith; the second period being the first six months of 1921, which was immediately preceding the completion of the inventory, and intended to reflect the then, "present day" prices and conditions. In the half year which has elapsed since this latter period the price level has materially receded and the "Cost to Reproduce" as of January 1, 1922, would reflect a marked reduction in the estimate as presented for the first six months in 1921. It is this fluctuation in the base which affords a serious objection to the use in a valuation of the prices which obtain at the period during which the same is undertaken.

In the two estimates to "Reproduce New" it was assumed that the property would be reproduced in "like" and not in "kind" which would apply for example in the substitution of steel for the wrought iron of the original elevated railway structures and the substitution of modern type of sub-station equipment where the manufacturer had discontinued the original design in favor of an improved type.

In addition, a statement is being compiled of the estimated prospective earning capacity of the transit property necessarily used in the public service at the rate of fare in effect prior to the enactment of the legislation. This will be the subject of a subsequent report.

Estimates were prepared of any claims presented by any company for consideration in the valuation of property not now existent, such as a claim for the inclusion of the elevated railroad structures which were removed during the remodeling under the Additional Track Certificates of 1913 and for which the Company alleges its original capital investment was impaired without compensation for the loss of the property. Such estimates were intended to make all facts available to the Commission and in no way involved any recognition as to their validity or to commit the Commission to any allowance therefor.

Organization of Bureau of Valuation

In general the work for a valuation is divided into two broad classes—Engineering and Accounting.

The Engineering work was organized under three general divisions.

The first, to cover all classes of general construction, such as track, structures, buildings, bridges, tunnels, underground duct lines, etc.

The second, to cover all rolling stock including revenue cars, service cars, car equipment and appurtenances.

The third, to cover electrical and mechanical equipment, such as power plants and sub-station equipment, engines, furnaces, boilers, shop equipment and tools, telephone, transmission and distribution systems.

In addition, a force was organized for the collection of the necessary data to be used in developing the prices to be applied to the inventory of the property in establishing the valuation thereof.

The force engaged in these activities numbered 140 employees at

the peak, including the accounting division and all office and stenographic forces.

As previously referred to, the valuation of the property under the Dual Contracts and Certificates was fixed by the cost determined under the provisions thereof. To expedite the completion of these determinations, the force previously engaged thereon was absorbed in the Bureau of Valuation and the determinations of cost brought up to June 30, 1921. This work entailed field inspection, verification of force accounts and statements of material submitted by the companies, computation of overhead expense for both company and city and the compilation of these results (including payments to contractors) into a comprehensive report for the approval of the Chief Engineer of the Commission. The force engaged on these activities numbered 128 employes at the peak of the work for both field and office.

For the appraisal of the land owned by the companies, a staff of experts was employed to cover each Borough under the direction of Mr. Chas. D. Olendorf, who was retained by the Commission to assume general charge and the full report by parcels of property is in the files of the Commission.

An accounting staff was organized primarily for the purpose of securing and tabulating accounting and statistical data concerning the financial status of the Companies and the results of their operations. Intensive analyses of the books, accounts and other records of the various Companies were made, to secure exact data pertaining to original unit costs entering into the construction and equipment of the railroads, for use in setting up valuations on the basis of original cost.

From the sworn annual reports filed with the Commission, balance sheets were prepared as of June 30, 1921, for each company together with comparative summary statements showing the results of operation for each year of the ten year period from 1912 to 1921 all of which are included herein as collateral information to the valuations.

Details of the capitalization of each company and system were also tabulated and market prices of the outstanding securities obtained for comparative purposes. Summaries of these tabulations are included among the exhibits in this report, together with charts showing for each system the details of the capitalization of each company within a system and the respective relationship thereof to the system. These charts also show the relative proportion of the outstanding securities which are held within the system and by the public.

The "Fixed Capital" assets representing the book values of the physical property as shown on the balance sheets of the companies as of June 30, 1921, have been analyzed and separate schedules prepared and presented herewith, showing by principal classes, the items of physical property, owned or controlled by each operating company, together with their book values. These schedules are submitted to make possible ready comparisons between the book values of physical property and the valuations thereof.

In addition to the above, significant statistical exhibits were prepared and are also included herein for each company and in system groups. In most cases, they are arranged to show yearly comparisons covering a ten year period, such statistics as number of passengers; revenue car miles; miles of track; operating ratios; rates of wages; fuel costs; operating expenses and revenues in cents per car mile, etc. These were prepared principally to make available basic information for determining the tendencies of operating results in the past and for prognosticating the future results.

Companies' Appraisals and Inventories

At the commencement of the work of the Bureau of Valuation and subsequent thereto there were available appraisals applying to the property of the New York Railways System and the Brooklyn Rapid Transit Co. surface lines. These appraisals which were made on behalf of the companies by engineering firms of standing are presented as contemporaneous exhibits to the present valuations. In each instance they have been segregated into the significant factors of the values placed on the properties and the results have been brought down to June 30, 1921, by the Bureau of Valuation by applying the adjustments reflected by the capital accounts of each company.

For the Manhattan Railway Co. an exhibit is presented showing appraisals made in connection with the proceedings by the company against the State Board of Tax Commissioners contesting the assessment levied on the value of the special franchises between 1906 and 1909 and this exhibit is supplemented with a summary of an analysis made by the accounting staff of the Bureau of Valuation of all expenditures on the Manhattan Elevated Railway property since its inception which were obtained through an examination of the books.

It is well to emphasize that the appraisals referred to in the foregoing, if employed for comparative purposes with the valuations as herein presented, must be used understandingly. The property which was included in the Companies' reports may not be identical with that appraised by the Commission through a difference in the allocation of ownership to companies within a system as well as in the distribution as to operative and non-operative property, particularly as respects land and buildings. Furthermore, the appraisal for the Brooklyn Rapid Transit Company was prepared for a rate case and included only such of the property as was to be presented for consideration in that proceeding; this appraisal has recently been brought to March 31, 1921, by the company.

General Methods

Two main elements enter into the valuation of any physical property, the preparation of an inventory and the establishing of the prices to be applied to each item included therein. It was essential for the valuation under discussion, to complete the work with all [fol. 582½] possible despatch and at the outset all available data was

collected, which might serve to lessen the time consumed in the preparation of the inventory, which is obviously the controlling factor in the progress of a valuation. Accordingly the inventories of the property, and such information as was contained in the records of all previous appraisals of any of the transit companies made by the predecessors of the present Transit Commission, were collected and assimilated so that such portions could be utilized as would apply to the present valuation. Similarly all inventories of property which were in the files of the companies or engineers in their employ were secured and utilized. This procedure contemplated the preparation in the office, by classes of property, of an inventory based on available records and with this data an actual and detailed inspection was made of all property appearing therein and an inventory prepared based on such inspection so that the result represented a determination independent of any previous examination or appraisal.

In setting up the inventory, by items of property, the grouping in the Uniform System of Accounts was followed in general, though in some instances the accounts were combined so as to represent a complete unit of equipment rather than its component parts.

The inventory included all property in existence as of June 30, 1921, except such items as track, which was abandoned and allowed to disintegrate so as not to be useful for operation. The inventory for the valuation, however, was set up segregating the property into operative and non-operative, the later including principally buildings and power-plant and sub-station equipment retained by the companies but not utilized in the operation of the railroad.

The inventory included all property and equipment deemed to be essential for the operation of the railroad even though as in one instance, a parent company claims ownership of a main power plant and alleges it furnishes current for operation as a commercial enterprise and that its property should not be included with that of the operating companies in arriving at a total valuation for the system. It was considered that if the property was to be acquired the power plant essential to and operated solely for the purpose of the railroad must be included in the transaction.

When the ownership of any property was in dispute between the companies included in a system it was allocated to that company holding such property in its possession.

Pricing of Inventories

Wherever possible an endeavor was made to establish the original cost for each item of property with the date of its installation or acquisition. An exhaustive study was made of the prices of materials and the rates for wages by years from 1890 to 1921 so as to determine the factor to apply to convert actual costs to the years when costs were not available or could not be secured.

Quotations were obtained from manufacturers and the data as to prices which had been collected in previous Commission Appraisals was utilized where it was deemed to be pertinent to the valuation in hand.

Estimates of all quantities entering into the construction of the railroad were confined to the actual net lines of the completed structure and allowances for any excesses were made in the development of the contract prices to be applied.

For property constructed or acquired subsequent to 1914 the actual cost thereof was adopted in the estimate for cost to reproduce from 1910 to 1914 as well as for the estimate of original cost.

Unit Costs

To arrive at an equitable valuation of the street surface railways certain basic assumptions must be made respecting the method of construction. This will be evident if it is borne in mind that the properties are being valued as the existing type of electric operated railways whereas with the exception of a few instances they were originally built and operated as horse car lines and were converted from time to time over a period of years. For the purpose of producing or reproducing the properties as existent today, it was assumed, that the company would contract for the work to be performed on the lines of their system on a successful program retaining the horse car operation on those lines not under construction. The program as thus assumed is outlined in the explanatory notes accompanying the detailed exhibits for each company.

In establishing the unit costs, due consideration was given to the small quantities entering into the construction per lineal foot of railroad and to the exigencies of such work conducted in the city streets and to similar difficulties connected with the completion of the structure, which would be factors in the cost of the various items.

For items such as track and roadway, which normally would be performed under contract, the unit cost for the several classes of work entering therein was estimated by years from 1890 to 1921 and prices applied to such property for the year corresponding to the construction.

Where actual contract prices to the company were available, they were employed after investigation as to their authenticity. Where they could be obtained, contract prices were used of structures similar to those being valued at the period adopted for the cost to reproduce the property. Where estimates were computed, the cost of materials, labor, handling charges, transportation and all other incidentals at the prices and rates prevailing during the year of actual construction were employed. The detailed records in the files of the Bureau of Valuation reflect the estimate for each element entering into such units costs. Unit cost data for certain of the main items was selected for publication in this report and similar exhibits for every item, to which unit costs have been applied, are available in the files of the Bureau.

For paving costs the records of the Department of Highways for each Borough were used for the year the work was actually performed.

For buildings, the estimate of cost was determined per cubic foot dependent on the type of building and the character of its construc-

tion. These unit prices per cubic foot were spot-checked after adoption through detailed estimates made of certain types.

The nomenclature adopted for "Track and Structures" designates as "Bare Cost" all charges for materials as incorporated in place in the work and for labor including foremen directly engaged in the performance of each item of the construction. An additional charge was then allowed for "Job Overhead" to cover (a) superintendence, timekeepers and checkers, storekeepers and material checkers, field engineers and sundry expense; (b) plant equipment, tools and supplies, and (c) extra work, quantities outside of net lines as estimated and contingencies; the resultant is designated as "Construction Cost." To this latter a charge was allowed for "Contractor's Services" representing the services of principals of the firm where the work is performed under contract, charges for the general overhead expense carried by a contractor for the direction of his business and profit for the performance of the contract; the total thus arrived at is designated as "Contract Cost."

The nomenclature used in the estimates for "Rolling Stock" and for "Electrical and Mechanical Equipment" designates as "Unit Cost" or "Contract Cost" the manufacturers' price to the company for the delivery of the item of equipment under purchase order or contract; to such price has been added any necessary expenditures by the Company for incidental work in connection with the installing and assembling of such equipment complete for operation and the result is designated as the "Construction Cost."

In any instance where construction was undertaken by a company with its own forces, the same unit costs were employed as for work completed under a contract as it was not believed that the company could perform the work at less expense than would result under a prudent contract with an experienced contractor having a trained organization and with trade and business connections at his command.

Overhead Charges to the Company

During the development and construction of the railroad, the company is obliged to defray the attendant expenses for legal services, executives, administrative and office forces; engineering, design and inspection; interest on expenditures; brokerage fees in securing funds; and taxes on property if levied by the municipality.

These charges have been segregated into "Expenses during Development" and "Expenses during Construction." Where the actual expenses for any of these items could be ascertained they were employed in the valuation on the "Original Cost" basis and where such records were not available, an estimate was prepared based on the type of organization and rates which prevailed at the period when the expense was originally incurred. Using these amounts as a base the cost was translated into equivalent charges for the "Cost to Reproduce" giving due weight to the conditions which obtained at these latter periods.

In each case it was assumed that the railroad would be constructed in sections and placed in operation as fast as integral units were completed and that thereupon appropriate proportions of these over-

head expenses would become a charge against operating revenue and the charges to construction were determined accordingly. The basis adopted is contained in the explanatory notes preceding the presentation of the exhibits for each company.

[fol. 583] Interest on expenditures during construction was allowed at 5% for the estimate of original cost, at 5% for reproduction cost for 1910 to 1914 and at 7½% for reproduction cost in 1921. These rates are deemed to conform with those which obtained at the periods specified.

Brokerage fees, consisting of the expense for marketing securities were allowed at 3½% in the estimate for original cost which rate was derived from an instance of the actual expense for such services. A rate of 5% was allowed for each of the two estimates of cost to reproduce. No consideration was given to bond discount or premium which it was held should not be treated as capital items.

Investigation indicates that no taxes were levied by the City on any property of the railroads during the construction, with the exception of real estate. The treatment of the latter item will be discussed subsequently. Taxes were not allowed on other items of property.

Prior to the commencement of construction, expenses are incurred for the executive, legal and engineering organization engaged on the development of the project and estimates were prepared to reflect the outlay for this purpose at each of the three periods adopted for the valuation. The treatment of these expenditures is presented separately for each company, later in the report.

Explanatory Notes on Appraisal of Certain Items of Property

Grading:

This account includes (a) excavation and disposal of the material for the net section (as defined by the standard design) of the road bed; (b) back-fill for excess excavation within the railroad area and contiguous structures such as clean-out manholes; (c) "the removal of obstructions" which covers all work of removing and re-locating interfering pipes and manholes and other sub-surface structures. For item (c) the estimate for underground electric railroads was based on an estimate of cost for the New York Railways made by the Public Service Commission in 1909 which was largely confirmed by certain original cost records which were obtained from other sources.

Paving:

Under this item has been included the necessary repavement within what is known as the "railroad area" extending to two feet outside of the outer rail of each track and appurtenant structures contiguous thereto. A separate item is shown for the repavement outside of the foregoing area which is intended to cover the work made necessary through the "removal of obstructions." It will be noted that the repaving occasioned by the construction of the underground conduits has been included separately under that item.

Track and structures:

The appraisal is based on measured or computed quantities entering into each item of this group with unit costs applied thereto.

Rolling stock:

The valuation is based on the result of a field inspection to determine the actual number of cars and their type and the prices applied are based on the actual or estimated cost to the company including the manufacturer's price and the additional expense to the company for furnishings, fittings and assembling where the car is not delivered complete and ready for operation.

Mechanical and electrical equipment:

From an actual field inspection an inventory was prepared for each main item of property in this group and the cost applied was obtained from manufacturers, company records and other available sources of information. Although an inventory and appraisal was completed for each sub-station of every company, the report herewith presents only the detailed exhibit applying to one selected sub-station for each company so as to curtail the size of the volume; similarly non-operating equipment has been presented only in a summary form; in each of these instances the complete exhibit is on file in the Bureau of Valuation in the same form as that presented for the station selected and the summary furnished for each company gives the total for each sub-station.

Land:

The land owned in fee by each company has been allowed at its market value as of June 30, 1921, determined by expert real estate appraisers. This market value was held to apply to both the original cost and the Costs to Reproduce. It was felt that the companies were entitled to credit for land at its market value because of its availability for sale for other than railroad purposes. It is an asset on which the company can realize the sales price and the company is therefore entitled to any appreciation which has occurred since the land was first acquired. The same procedure was followed for "right of way" where it formed a part of a plot owned in fee which could be disposed of for other than railroad purposes. In admitting this appraised market value it was held that this carried all costs for acquisition, interest and taxes, as the market value is a price to the purchaser and any such charges attach to the previous owners.

Easements, private right of way, consents and damages:

For each of these items, it was held that allowances should be limited to the actual expenditures by the company and the same amount is included for the costs to Reproduce as in the original cost estimate. This was based on the fact that the money so expended served only to acquire the right to operate the railroad and that the com-

pany retains only that right and the value is dependent entirely on the worth of such right. In other words, generally the value of these rights has not been enhanced by an increase in value of any of the adjoining land. Furthermore, the worth of such rights is largely fixed by the earnings of the railroad and in the light of the present operating returns this would not conduce to an increase in the allowance over the original expenditures by the company. Where actual expenditures could not be ascertained from the books of the company, an estimate of the same was made based on such records and data as were available.

Materials and supplies:

The materials and supplies on hand by each company as of June 30, 1921, were allowed at their book value as it was felt that these represented a current asset for which it is reasonable to expect the cost would be realized if they were disposed of, or that an expenditure commensurate with the cost would be necessary if the stock was to be duplicated.

Depreciation

The treatment of depreciation as applied to the property of any public utility company has been a widely controverted question in every valuation. In general the contention of the transit companies has been that the upkeep of their property is on such a high standard that all wear and tear is corrected from time to time; that their property is maintained in condition suitable for full and efficient service and that therefore no depreciation should be applied in considering the fair value of such property.

It has been claimed that for a property which has been properly managed and where the income over a period of years has been insufficient to permit depreciation reserves to be set up, the owners of the property should not be penalized by a valuation from which accrued depreciation has been deducted. Further, that if the expense of providing service to the public depleted the income from operation so as not to permit of reserves for depreciation, the property deteriorated in service to the public at the expense of the investors and that if the valuation was to be on a basis of cost less depreciation, the investors, in addition to not having received a fair return in the past would thereby in effect be deprived of that portion of their investment represented by the accrued depreciation.

It has also been represented that "to insure a fair appraisement as of today the door of the past should remain open until there has been fully considered the burdens imposed upon present and future generations which accepted service at less than cost." Further, that as in the past, service was furnished at less than cost the "Permanent Shrinkage" in such property "which was not assessed against past rates, if now deducted en bloc from the physical value, present riders would be required to amortize this shrinkage for the benefit of future generations."

Again, that "if the property should be ultimately purchased at 'depreciated value' it would result 'in transferring property value from present ownership to the pockets of the future riding public.'" In short, it is argued that by virtue of rates fixed in the past the companies derived insufficient income to set up reserve funds and to provide for a fair return on their investment and are entitled to have the deficiency in past income considered as "Deferred Earnings" which should be credited, if a depreciated valuation of the property is to be adopted; or, in other words, included in the "Deferred Earnings" are the reserve funds for depreciation and amortization.

Aside from a theoretical discussion as to its treatment, the fact of the depreciation of the physical property of a railroad system must be recognized as a factor entering into its value as an operating property. In considering the investor it would become necessary to trace the actual investment of the present holders of the securities and to ascertain whether such investment when made reflected the depreciated condition of the property before any injustice in deducting [fol. 584] depreciation from the full valuation of the property, could be seriously maintained. Investors in transit properties have changed many times since operation was first commenced and the price paid in the transfer undoubtedly considered the condition of the property.

Where it is held that depreciation should rightfully apply in the appraisal of a public utility company the straight line basis has been quite uniformly accepted as the most practical means of determining the amount which should be deducted from the value of the property to which depreciation applies. This method consists in ascribing an estimated life to each class of property and computing depreciation on its cost or valuation on the basis of its age on the date of the appraisal. For the purpose of this investigation, which contemplates a determination of every element which may be considered applicable to the final valuation of the property, an estimate has been prepared of the accrued depreciation on the straight line basis for each of the transit companies or system.

For the property included under the Dual Contracts and their Related Certificates the depreciation has been computed on the basis of the report of the former Transit Construction Commissioner, addressed to the interested companies, in which rates of depreciation have been specified for each class of property. These rates have been applied to the cost of the property from the date it was placed in operation. These rates, however, have not as yet been formally accepted by the companies.

Expenditures Necessary to Place Property in First-class Operating Condition

Under "depreciation" the contention of the companies was discussed as to the standard of their upkeep serving to eliminate the depreciation which may be held to apply to such properties. For the purpose of determining the actual conditions, a field inspection was made of each class of property to ascertain its condition and to pro-

vide data for an estimate of the expenditures necessary to place the property in first-class operating condition. As in the case of the valuation, this estimate was made as of June 30, 1921, and is not necessarily the present day condition particularly in respect to rolling stock which is under a current schedule of maintenance and is also subject to injury from accidents in the period intervening since the date of the examination.

An estimate of this character is necessarily approximate but through a detailed examination by members of the staff experienced in the repair of each class of property, an endeavor has been made to obtain a result reasonably correct.

In the case of the transit properties, having due regard to the exigencies of the past years and the practice as to retirements and renewals and having in mind the immediate demands for sufficient and efficient service, the requirements for first-class operation must consider a program for rehabilitation so as to correct deficiencies which may have occurred through the lack of revenue in the past few years. There has therefore been included in the estimates of the necessary expenditures not only an amount to correct deferred maintenance and repair but also an allowance for renewals and replacements of equipment which because of age and general inutility should be retired from service.

It is believed that due consideration should be given to an estimate of the necessary expenditure of this character as a practical means of determining the actual rather than the theoretical depreciation. Life is necessarily affected by the standard of the repairs. Renovation and rehabilitation from time to time will operate to make over and renew and if successively continued may prolong the life in service to an extent difficult to estimate. The element of obsolescence would then become the determining factor in the retirement of most classes of the property employed in the operation of the railroads.

Conclusions and Recommendations

After a full consideration of all the facts as developed by the present investigation and bearing in mind that the plan under which the Commission is operating contemplates the acquisition of the property, it is our conclusion that a fair valuation for the existing property of companies other than that included under Contracts 1, 2, 3 and 4 and their Related Certificates would consist in allowing the original cost less the expenditures necessary to put the property in first-class operating condition.

Valuation of the property paid for by the Interborough Rapid Transit Co. as included under Contract 3 and similarly that paid for by the New York Municipal Railway Corporation under Contract 4 and also the property included under the certificates for extensions, additions, third tracking and reconstruction of the elevated structures, which accompany Contracts 3 and 4 should be based on the determination of cost by the Chief Engineer of the Commission as provided in such contracts with the deduction therefrom of the accrued

depreciation also therein provided for. The property provided under Contracts 1 and 2 by the Interborough Rapid Transit Co. has also been appraised on this same basis.

It is our opinion that the cost so determined, based on accurate cost data, represents the fair reproduction cost referred to in the transit act.

It is our opinion that there should be included in such valuation only the property now existent and suited for operation.

Land, buildings, power plants or other equipment not used or useful for operation should be excluded from the valuation and deemed to be assets of the company to be disposed of as it sees fit.

No track or roadway which has been abandoned and allowed to disintegrate so as not to be suitable for operation should be included in the valuation.

Based on the foregoing premises summaries have been prepared reflecting for each company the net amount of the valuation which is recommended for adoption.

It must be realized that the valuations are of the property as of June 30, 1921, and that the results should ultimately be brought to the date of any contemplated settlement so as to adjust for retirements, replacements, additions and betterments and also to provide for any fluctuations in the value of land, materials and supplies on hand and in the expenditures to place the property in first-class operating condition.

As before stated, all valuations as herewith presented are based on the inventory of property, as of June 30, 1921, which was deemed to be used or useful for the operation of the railroads or systems as then constituted or as then capable of being operated. It was not within the purview of this Report to segregate or discard in whole or in part any property of any company which might be designated as not necessary or needful in any plan developed for the revamping of the transit facilities so as to effect an economic unification of the present systems. The final statutory plan of the Commission is expected to embrace only such property as is to be acquired for such a unified system of transit and the valuations herewith will permit of the schedule to be prepared of the properties on any premises as therein adopted.

Yours very truly, (Signed) John H. Madden, Valuation Engineer. Fred W. Lindars, Chief Accountant.

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[fol. 585] EXHIBIT BS (Cont'd)

Belt Line Railway Corporation

Grand Summary Valuation of Operating Property as of June 30, 1921, on the Basis of Original Cost

Name of company	Total valuation	Expenditures necessary to place property in first class operating condition	Net valuation
Belt Line Railway Corporaton.....	$1,831,559	$81,978	$1,749,581

Explanation: Figures taken from page 1 of Exhibit BS.

[fol. 586] EXHIBIT BS (Cont'd)

Belt Line Railway Corporation

Expenditures Necessary to Place Property in First-class Operating Condition as of June 30, 1921

Item	Amount
Track and Roadway	$30,800
Buildings	10,000
Electrical and Mechanical	.....
Rolling Stock	41,178
	$81,978

Explanation: Figures taken from page 12 of Exhibit BS.

(Here follows one sheet of Exhibit BS, marked side folio page 587.)

[fol. 588]

Exhibit BS (Cont'd)

Belt Line Railway Corporation

Appraised Valuation of Real Estate, Exclusive of Right of Way, as of June 30, 1921

Index	Boro.	Sec. or ward	Block	Tax lot	By street, etc.	Use	In operation: Land	In operation: Improvements	Not in operation: Land	Not in operation: Improvements	Remarks
A1	Man.	4	1082	14	10th Ave. W. Side Block Front N. S. W. 53, S. Side W. 54th St.	Car House..	$531,000	....	....	....	Chas. D. Olendorf, Special Counsel.
						Storage Battery Station	.....	....	....	....	
						Totals ..	$531,000	$...	$...	$...	
					Messrs. Ruland & De Bost, Appraisers.	Grand Totals.	.....	....	....	....	

Explanation: Figures taken from page 173, Exhibit BS.

(Here follow two sheets of Exhibit BS, marked side folio pages 589 and 590.)

Exhibit BS

BELT LINE RAILWAY CORPORATION

SUMMARY - TRACK & STRUCTURES - APPRAISAL OF PROPERTY USEFUL FOR OPERA

USED FOR OPERATION

Item	Unit	Quantity	Original Cost Basis: Original Cost	Original Cost Basis: Accrued Depreciation	Original Cost Basis: Original Cost Less Depreciation	Cost to Reproduce New, 1910-1914 Price Basis: Cost to Reproduce	Cost to Reproduce New, 1910-1914 Price Basis: Accrued Depreciation	Cost to Reproduce New, 1910-1914 Price Basis: Cost to Reproduce Less Depreciation	Cost to Reproduce New, 1921 Price Basis: Cost to Reproduce	Cost to Reproduce New, 1921 Price Basis: Accrued Depreciation
Grading										
Excavation	Cu.Yds.	16,627	$ 20,403	$	$ 20,403	$ 26,137	$	$ 26,137	$ 52,384	$ .....
Backfill	Cu.Yds.	688	268	.....	268	336	.....	336	660	.....
Removal of Obstructions	Lin.Ft. / S.T.	19,426	51,867	.....	51,867	68,360	.....	68,360	149,580	.....
Ties	M.B.M.	25	456	320	136	747	523	234	1,896	1,327
Rails, Fastenings & Joints										
Rails	Tons	1,171	32,729	9,819	22,910	47,285	14,185	33,100	86,839	26,051
Fastenings	100lbs.	2,843	6,601	1,980	4,621	8,233	2,470	5,763	16,404	4,921
Joints	Each	1,414	3,507	1,052	2,455	3,993	1,198	2,795	5,370	1,611
Total Rails, Rail Fastenings & Joints			$ 42,837	$ 12,851	$ 29,986	$ 59,511	$ 17,853	$ 41,658	$ 108,613	$ 32,583
Special Work	Lin.Ft. / S.T.	3,283	57,361	28,680	28,681	94,613	47,306	47,307	119,901	59,950
Underground Construction										
Castings, Plates etc. in Place	Tons	1,577	73,870	3,693	70,177	96,357	4,818	91,539	254,606	12,730
Masonry	Cu.Yds.	7,287	62,878	3,144	59,734	71,179	3,559	67,620	152,687	7,634
Slot Rail in Place	Tons	501	18,923	3,785	15,138	25,873	5,175	20,698	47,685	9,537
Slot Joints	Each	1,638	721	144	577	1,558	328	1,310	3,358	672
Stringers	M.B.M.	105	2,507	1,003	1,504	3,508	1,403	2,105	6,475	2,590
Drains	Lin.Ft.	990	2,488	124	2,364	3,181	159	3,022	5,028	251
Total Underground Const.			$161,387	$ 11,893	$149,494	$201,756	$ 15,442	$ 186,294	$ 469,839	$ 33,414
Track Laying & Surfacing	Lin.Ft. / S.T.	34,161	24,475	4,895	19,580	57,075	11,415	45,660	61,318	12,264
Paving										
Inside Railway Area	Sq.Yds.	24,809	75,875	37,937	37,938	101,258	50,619	50,619	184,746	92,373
Outside Railway Area	Sq.Yds.	2,535	7,767	3,883	3,884	10,312	5,156	5,156	18,859	9,429
Underground Conduits										
Ducts in Place	DuctFt.	395,932	83,535	8,353	75,182	106,622	6,835	103,787	198,466	19,847
Shops & Car Houses	—	.....	275,812	117,000	158,812	370,876	157,500	213,376	789,756	323,000
Furniture & Fixtures	--	.....	1,407	703	704	1,655	827	828	3,062	1,531
TOTAL			$803,450	$ 226,515	$576,935	$1,099,238	$ 307,476	$ 791,762	$2,129,080	$ 585,718

Explanations: These are the details on the appraisal for the roadway and track items page 155, Exhibit B.S.

Exhibit BS (cont'd)

VI

BELT LINE RAILWAY CORPORATION

URES - APPRAISAL OF PROPERTY USEFUL FOR OPERATION AS OF JUNE 30, 1921.

OPERATION						NOT USED FOR OPERATION								
	Cost to Reproduce New					Original Cost Basis			Cost to Reproduce New					
Price Basis		1921 Price Basis							1910-1914 Price Basis			1921 Price Basis		
Ca-tla-	Cost to Reproduce Less Depreciation	Cost to Reproduce	Accrued Depreciation	Cost to Reproduce Less Depreciation	Quantity	Original Cost	Accrued Depreciation	Original Cost Less Depreciation	Cost to Reproduce	Accrued Depreciation	Cost to Reproduce Less Depreciation	Cost to Reproduce	Accrued Depreciation	Cost to Reproduce Less Depreciation
....	$ 26,187	$ 52,384	$	$ 52,384	7,879	$ 8,809	$	$ 8,809	$ 11,264	$	$ 11,264	$ 22,373	$	$ 22,373
....	336	660	.....	660	8	3	.....	3	4	.....	4	8	.....	8
....	68,360	149,580	.....	149,580	5,252	14,023	.....	14,023	18,487	.....	18,487	40,440	.....	40,440
823	234	1,696	1,327	369	93	1,691	1,184	507	2,754	1,928	826	6,984	4,889	2,095
,185	33,100	86,839	26,051	60,788	543	15,177	4,553	10,624	21,926	6,578	15,348	39,552	11,866	27,686
,470	5,763	16,404	4,921	11,483	754	1,779	534	1,245	2,109	633	1,476	4,241	1,273	2,968
,198	2,795	5,370	1,611	3,759	899	1,189	357	832	1,772	532	1,240	2,951	885	2,066
,853	$ 41,658	$ 108,613	$ 32,583	$ 76,030		$ 18,145	$ 5,444	$ 12,701	$ 25,807	$ 7,743	$ 18,064	$ 46,744	$ 14,024	$ 32,720
,806	47,307	119,901	59,950	59,951	577	6,765	3,382	3,383	11,711	5,855	5,856	15,420	7,710	7,710
,818	91,539	254,606	12,730	241,876	437	20,293	1,014	19,279	26,640	1,332	25,308	70,705	3,535	67,170
,559	57,620	152,687	7,634	145,053	1,101	9,311	466	8,845	10,546	527	10,019	22,319	1,116	21,203
,175	20,698	47,685	9,537	38,148	134	5,071	1,014	4,057	6,932	1,386	5,546	12,771	2,554	10,217
328	1,310	3,358	672	2,686	474	209	42	167	474	95	379	972	194	778
,403	2,105	6,475	2,590	3,885	0	0			0			0		
159	3,022	5,028	251	4,777	310	779	-39	740	996	50	946	1,574	79	1,495
,442	$ 186,294	$ 469,839	$ 33,414	$436,425		$ 35,663	$ 2,575	$ 33,088	$ 45,588	$ 3,390	$ 42,198	$108,341	$ 7,478	$100,863
,415	45,660	61,318	12,264	49,054	16,749	5,947	1,189	4,758	8,444	1,689	6,755	16,601	3,320	13,281
,619	50,619	184,746	92,373	92,373	17,173	53,471	26,735	26,736	82,186	41,093	41,093	147,483	73,741	73,742
156	5,156	18,859	9,429	9,430	1,792	5,593	2,796	2,797	8,509	4,254	4,255	15,359	7,679	7,680
856	105,787	198,466	19,847	178,619	95,300	19,844	1,984	17,860	24,875	2,487	22,388	46,399	4,640	41,759
300	213,576	789,756	323,000	466,756	0	0			0			0		
827	828	3,062	1,531	1,531	0	0			0			0		
476	$ 791,762	$2,129,080	$ 585,718	$1,543,362		$ 169,954	$45,289	$124,665	$239,629	$ 68,439	$171,190	$466,152	$ 123,481	$342,671

STATE OF NEW YORK - TRANSIT COMMISSION
BUREAU OF VALUATION
1922.

details on the several types of
and track items, taken from

Exhibit BS

BELT LINE RAILWAY CORPORATION

ROLLING STOCK

Valuation as of June 30, 1921

Description	Year Built	Group	No. of Cars	Estimated Life Years	Expended Life		Original Cost Basis			
							Estimated Cost			
					Years	Per Cent.	Per Car	Total	Depreciation	Estimated Cost Less Depreciat
Passenger Cars										
Single Truck Storage Battery	1913	A	24	33 1/3	8	24	$3,270	$78,500	$18,800	$59,700
TOTAL PASSENGER CARS			24					$78,500	$18,800	$59,700
Service Cars										
Single Truck Storage Battery Sweeper	1913	b	3	33 1/3	8	24	$5,028	$15,100	$ 3,600	$11,500
Single Truck Electric Sweeper	1913	c	1	33 1/3	8	24	4,528	4,500	1,100	3,400
TOTAL SERVICE CARS			4					$19,600	$ 4,700	$14,900
GRAND TOTAL ALL CARS			28					$98,100	$23,500	$74,600

Explanation:

These details for Rolling Stock of the Belt Line R
are taken from page 170, Exhibit BS.

Exhibit BS (Contd)

BELT LINE RAILWAY CORPORATION

ROLLING STOCK

Valuation as of June 30, 1921

Original Cost Basis			1910 to 1914 Price Basis				1921 Price Basis			
Cost		Estimated Cost	Estimated Cost			Estimated Cost	Estimated Cost			Estimated Cost
Total	Depreciation	Less Depreciation	Per Car	Total	Depreciation	Less Depreciation	Per Car	Total	Depreciation	Less Depreciation
$78,500	$18,800	$59,700	$3,450	$ 82,800	$19,900	$62,900	$ 6,900	$165,600	$39,700	$125,900
$78,500	$18,800	$59,700		$ 82,800	$19,900	$62,900		$165,600	$39,700	$125,900
$15,100	$ 3,600	$11,500	$5,028	$ 15,100	$ 3,600	$11,500	$10,056	$ 30,200	$ 7,200	$ 23,000
4,500	1,100	3,400	4,528	4,500	1,100	3,400	9,056	9,100	2,200	6,900
$19,600	$ 4,700	$14,900		$ 19,600	$ 4,700	$14,900		$ 39,300	$ 9,400	$ 29,900
$98,100	$23,500	$74,600		$102,400	$24,600	$77,800		$204,900	$49,100	$155,800

STATE OF NEW YORK - TRANSIT COMMISSION
BUREAU OF VALUATION
January, 1922.

of the Belt Line Railway Corporation
ibit BS.

[fol. 591] EXHIBIT BT

STATE OF NEW YORK:

Public Service Commission for the First District

Case No. 1364

In the Matter of the Hearing on Motion of the Commission as to Rates of Fare upon Connecting or Intersecting Lines of Street Railroad in the Borough of Manhattan, City of New York.

Notice of Hearing

Notice is hereby given that the Public Service Commission for the First District will hold a hearing on the 6th day of July, 1911, at 11:00 o'clock in the forenoon, or at any time or times to which the same may be adjourned, at the rooms of the Commission, No. 154 Nassau Street, Borough of Manhattan, City of New York, to inquire and determine whether the regulations, practices, services and rates of fare of the Metropolitan Street Railway Company or Adrian H. Joline and Douglas Robinson, its Receivers, The Third Avenue Railroad Company or Frederick W. Whitridge, its Receiver, The 42nd Street, Mahattanville and St. Nicholas Avenue Railway Company or Frederick W. Whitridge, its Receiver, The Dry Dock, East Broadway and Battery Railroad Company or Frederick W. Whitridge, its Receiver, the Kingsbridge Railway Company, the Second Avenue Railroad Company in the City of New York or George W. Linch, its Receiver, The Central Park, North and East River Railroad Company, the South Shore Traction Company or Paul T. Brady and Willard V. King, its Receivers, and the 28th and 29th Streets Crosstown Railroad Company or Joseph B. Mayer, its Receiver, in respect to the transportation of persons in the First District are unjust, unreasonable, improper or inadequate and whether changes in the same ought reasonably to be made; also to inquire and determine what lines of street railroad owned, operated, controlled or leased by such street railroad corporations or their receivers, or any two or more of them, form a continuous or connecting line of transportation or could be made to do so by the construction and maintenance of switch connection or interchange track at connecting points, or by transfer of passengers at connecting points, and whether such street railroad corporations or their receivers, or any two or more of them, should be ordered and directed to establish through routes and joint rates, fares and charges for the transportation of passengers over such lines in the manner prescribed by Section 49 of the Public Service Commissions Law.

By the Commission

(Signed) Travis H. Whitney, Secretary. (L. S.)

[fol. 592] STATEMENT RE EXHIBIT BU

Order of Public Service Commission for the First District of the State of New York in Case No. 1364, dated July 11, 1911, establishing certain joint routes.

(Omitted.)

[fol. 593] EXHIBIT BV

Opinion of Public Service Commission for the First District of the State of New York in Case #1364 upon the Adoption of Its Transfer Order of December 5, 1911.

This is a proceeding brought under Section 49 of the Public Service Commissions Law for the purpose of determining whether transfers should be ordered restored at 151 points of intersection or connection of the street surface railroad lines in the Borough of Manhattan, where prior to 1908 transfers were given. Testimony was taken in July, 1911 and on July 11, 1911 the Commission adopted an order requiring the intersecting or connecting street surface railroads in Manhattan to establish, on or about August 10, 1911 through routes and joint rates either by transfer or by the operation of through cars. The Commission did not attempt in this order to fix the rates, but directed the Companies to do so and to notify the commission on or before August 10, 1911, whether the routes and rates had been established, what the rates would be and what portion of such rate each company or its receiver would receive. An adjournment of the hearing was directed to August 15, 1911.

At the adjourned hearing it appeared that the companies were willing to establish through routes and a joint rate of eight cents for one transfer and ten cents for two transfers, but did not wish to establish this rate and put it into effect if the commission was of the opinion that this rate when established would be unsatisfactory. The Commission considered the companies' suggested rate and the hearing was continued to determine what were just and reasonable rates for through transportation. The Commission announced that it desired to have the companies place upon the record the facts and figures upon which the eight and ten cent rate offer was based. The suggested eight and ten cent joint rate was never established by [fol. 594] the companies, although they could have done so without action by the Commission, and the taking of testimony was then resumed and continued until November, 1911.

Under the provisions of sub-division 3 of Section 49 of the Public Service Commissions Law as amended in 1910, since the through routes and joint rates were not established by the companies within the time specified in the order of July 11, 1911, the Commission is now empowered in this proceeding to prescribe joint rates as a maximum to be charged and to require the companies within a specified time to agree upon the division of the joint rate.

The failure of the public to use to any considerable extent the eight and ten cent joint rate now in operation on 59th Street convinces us that if transfers are to be ordered between the several companies or systems at all they should be ordered in such a manner as to make possible transportation for a five cent fare. This inquiry has been mainly directed to ascertaining the results of the transfer system in use prior to 1908, what the effect of the curtailment of the transfer privilege has been, and what will be the probable effect of a return to the free transfer system properly restricted. That the curtailment of the transfer privilege in 1908 worked a great hardship to many and was a great inconvenience to many more is shown by the testimony and is generally conceded. Industrially the City had become adjusted upon the basis of a five cent fare with free transfers.

In 1907 and 1908 under the direction of the Federal Courts, receivers were appointed for nearly all the surface lines in Manhattan and, as each line or system was severed from the unified system, transfers were abolished until finally there were 151 points at which passengers who had formerly received transfers were obliged to pay an additional fare. The dismemberment of the system was expected to place the companies upon a sounder financial basis and the curtailment of the transfer privilege was urged as a means of [fol. 595] increasing the revenues of the companies.

In March, 1908 the receivers of the railroads comprising the Third Ave. System and the receivers of the Metropolitan system applied to the United States Circuit Court for instructions as to the discontinuance of transfers between their systems and on March 31, 1908, Mr. Justice Lacombe in an opinion reported in 161 Fed. Rep. at page 879 gave instructions for the discontinuance of transfers at certain points. This opinion considering the situation "as a business proposition," states (p. 880):

"It is obvious that a curtailment of transfer privileges in the manner suggested will increase the cash receipts of the properties affected, and since receivers are trustees for the creditors and owners their duty to operate the roads so as to increase earnings is equally obvious"

The present inquiry involves all the surface lines of Manhattan and if the effect of the abolition of transfers was not to help these companies taken as a whole, either by increasing revenues or decreasing expenses, it is evident that a rate is in force which inconveniences millions of people and that the raising of the joint rate by curtailment of transfers did not accomplish its main purpose.

The withdrawal of transfer privileges occurred at various dates, the most important changes having taken place on April 11, 1908 when transfers were discontinued at intersecting points on the lines of the Metropolitan and the Third Avenue systems. On August 6, 1908, 59th Street crosstown transfers were discontinued and on November 12th, 1908 those of the Second Avenue Company. The changes made after June 30th, 1908, which marks the close of the

fiscal year, were, however, much less important than those made prior to that date, as may be seen from the following statistics of free transfers. Exhibit 17, a copy of which is annexed to this opinion, shows the total number of free transfers reported by the combined Manhattan Service Companies in each fiscal year from 1907 to 1910, as follows:

[fol. 596] 1907	194,820,920
1908	196,672,167
1909	139,607,266
1910	139,011,581

The discontinuance of transfers was effected too late in the fiscal year of 1908 to reduce the aggregate number of transfers in that year below that of 1907 but its full effect appears in 1909 when the number of transfers was 55,000,000 smaller than in 1907.

The fiscal year 1908 was the transitional year in which the New York City Railway system was separated into the Metropolitan and Third Avenue systems. One receivership succeeded another and operating conditions were in process of readjustment. Even the records were in confusion and the evidence offered by the witnesses of the Third Avenue company in some respects conflicts with the companies' reports for that year. Direct comparison should, therefore, be made between the fiscal year 1907 when universal transfers were issued, and 1909 during the greater portion of which the limited transfer system was in full operation. The following figures from Exhibit 17, which was compiled from the sworn reports of the companies, afford the comparison:

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	Year ending June 30		Increase or (D) decrease
	1907	1909	
Passenger car miles	57,676,104	55,255,497	D 2,420,607
Free transfers	194,820,920	139,607,286	D35,213,654
Paying Passengers	377,017,192	362,077,663	D14,939,527
Amount of fares	$18,810,457	$17,997,252	D $813,205
Operating expenses (total)	11,383,557	13,326,858	1,943,301
Maintenance	$2,556,813	$4,098,627	$1,541,814
Power supply	1,280,760	1,188,413	D 92,347
[fol. 597]			
Operation of cars	5,045,804	5,213,126	167,322
General	2,500,180	2,826,692	326,512

From this comparison, it appears that any expectation which the Receivers of the companies, or the Court that authorized the abandonment of the transfers, may have entertained that the restriction of transfer privilege would transform millions of free passengers into

paying passengers was not fulfilled. Instead of an increase of passenger revenue there was an actual decrease of $813,205 or approximately 15,000,000 pay passengers.

If then the surface roads did not increase their revenue by the relinquishment of transfers, any financial improvement in their operations must be looked for in a reduction of expenses. The foregoing comparison between 1907 and 1909 shows, however, that there was no reduction in operating expenses rather an actual increase. The causes of such increase are numerous and involved and it is neither profitable nor necessary to enter into a detailed analysis thereof. It is well recognized that the expense of maintenance is a variable quantity, depending upon the standards set by the management in any particular year. The group of "general expenses" again might be increased by reason of extraordinary expenses attending bankruptcy proceedings and receiverships, such as deeds of receivers, lawyers, and accountants. The "operation of cars," however, consists principally of the wages of motormen and conductors and is in very close direct relation to the amount of car service rendered as expressed in the number of car miles. But notwithstanding a reduction in the car service in 1909 to the extent of 2,420,607 car miles as compared with 1907, there was no saving in this group of expenses.

So far as the question of transfers is concerned, it is really unneces- [fol. 598] sary to discuss the causes of the increase in operating expenses, since there is a much simpler test of the financial consequences of changes in the transfer system. Such changes affect expenses only through the car mileage required to care for the traffic that offers itself. Changes in the volume of traffic will not ordinarily affect the cost per car, or per car mile in any considerable degree. The cost per car mile is the same whether the passengers carried are transfer passengers or revenue passengers and any change in the car mile cost must be a change due to conditions that would have existed whether transfers were or were not given as before. If any gain in net revenue is to result from a change in the transfer system it must result from an increase in the passenger receipts per passenger car mile. The amount of fares remaining the same or increasing, there will be an increase in the passenger receipts per car or car mile with each reduction in the car mileage and a corresponding increase of the net revenue per car mile. No financial gain will be obtained in any other way; and if, therefore, the abolition of transfers benefited the street railway companies that benefit would appear in the ratio of the passenger receipts to passenger car miles. Both of these items are absolutely definite and not a matter of opinion that could lead to any dispute.

In 1907, when the free transfer system was in full effect the companies gave 195,000,000 free transfers, collected $18,810,457 in fares, and ran 57,676,104 passenger car miles to carry the traffic. The passenger receipts therefore averaged 32.61 cents to the car mile. In the fiscal year 1909, after the discontinuance of transfers at practically all of the 151 intersecting points listed in Exhibit #2, the companies gave only 140,000,000 free transfers, collected a little less than $18,000,000 in fares, and operated 55,255,497 passenger car

miles. The passenger receipts in that year averaged 32.57 cents per [fol. 599] car mile, not only failing to show any gain over 1907 but rather a small decrease, and this appears in spite of the fact that the introduction of larger cars should result in a larger revenue per car mile, as should also the closer collection of fares made possible through the introduction of Pay-as-you-enter cars.

The net passenger revenue of the companies so far as it was affected by changes in the transfer system having been approximately the same per car mile in 1909 as in 1907, the total net returns from passenger traffic of 1909 would be reduced in the same proportion that the total car mileage was reduced. At least thirty per cent of the gross revenue will remain as a return upon investment after the payment of operating expenses, since the ratio of expenses to revenue has always been under 70%, excepting in years when extraordinary expenditures had been made for deferred maintenance or rehabilitation of track and equipment. On this assumption the net revenue per car mile would average about 10 cents, and as 2,420,607 fewer car miles were operated in 1909, after the reduction in the volume of traffic effected by the restriction of transfer privileges, than in 1907, the total loss in net would amount to approximately $240,000. This figure is not exact, but is a sufficiently close estimate for all practical purposes.

But the investment, which receives its return out of net revenue, would not be reduced in anything like the proportion in which car service was reduced. The amounts invested in rolling stock might indeed be reduced, but the larger amount invested in tracks, power houses and other buildings would not be sensibly affected. "Fixed charges" like interest are by their very definition incapable of such close control as wages, fuel, and supplies. A large portion of the taxes and even of operating expenses, such as the salaries of officers, likewise remain constant and do not respond to increases or decreases [fol. 600] in the volume of traffic and car service. This fact has an exceedingly important bearing on the present situation because it explains why the owners of these properties suffered an actual loss as a result of the decrease in net revenue that followed the reduction in the volume of traffic when passengers who had formerly ridden on transfers refused to pay two fares. The great majority of such passengers either walked to their destination from the former transfer point, or took a more roundabout journey (making a long haul for the street railways), or were driven to the subway or elevated lines.

The economic principle upon which railroad traffic manages have erected the existing structure of freight rates in the United States is to the effect that all traffic is profitable which reimburses the carriers for the direct costs of movements and leaves a surplus to apply toward heavy fixed charges of all classes, including maintenance and administration as well as interest. Essentially the same principle underlies the movement in the direction of consolidating the traction companines in New York County, and promoting traffic by the establishment of a universal five cent fare for a single continuous trip in one general direction. The principle is still followed

in Brooklyn, where the net revenues of the companies' have steadily increased. It is still followed in the Borough of the Bronx and has brought to the carriers large increases in traffic that are admittedly profitable. The through trip for a single fare has become universal in Chicago, quite recently, and has contributed to the prosperity of the companies. It has been introduced on the Twenty-eighth and Twenty-Ninth Streets Crosstown railroad in the Borough of Manhattan, and other lines on which Third Avenue Cars are operated, and in many cases has turned operating deficits into surpluses. The general manager of the Third Avenue system has testified that the companies in the system voluntarily give transfers at many intersecting points where free transfers are not required by law, and this [fol. 601] policy is obviously dictated by business sense.

The capital put into the street surface railway property of Manhattan, whence it can be withdrawn only with difficulty and at a loss amounts in the aggregate to a large sum. The gross returns upon these properties are not so large as they were eight years ago, when the number of passengers exceeded by many millions the number at the present time. To the property owners it is of the greatest importance that the investment in power houses and tracks as well as cars, be utilized to its utmost capacity. Such utilization of the entire investment is not being made under the present policy of the companies. By affording a through ride for a single fare, they might secure large additions to revenue without proportionate increases in expenses. Many of the additional passengers would be carried in the non-rush hours in cars now running with light loads and would impose practically no additional expense. For rush hour traffic requiring additional cars, there would be little, if any, additional expense for such matters as cleaning tracks, removing snow, salaries of officers, taxes on corporate real estate, etc. The interest charges would be but slightly increased as the only additional capital required would be the cars. With net revenue per car or car mile increasing or at the worst remaining stationary the additional car mileage would increase the total profits. Such at least is the result indicated by the analysis of the figures of 1907 and 1909.

No order of the Commission should hamper companies in their efforts to collect a fare for each separate journey. There is no valid reason whatever why a passenger should expect the establishment of such a loose and unrestricted system of transfers as would permit a round trip to be made for a single fare, and we are confident that the management of the several companies, by proper regulation, can greatly reduce the abuses which existed in 1907.

[fol. 602] In many cases prior to 1908 passengers were enabled to make a long trip which included several more transfers than necessary, for the purpose of stopping off at any one of several transfer points and then continuing the journey. This system enabled the passenger not only to reach almost any point in the Borough for a single fare, but to enabled him to reach such point by a great number of different routes. We believe the convenience of the public will be served and that practically all parts of the Borough can be

reached if the passenger is allowed one transfer to a foreign system and a re-transfer to another line of that foreign system or to another line of the company or system from which he obtained his first transfer.

The systems now operating north and south lines in the Borough of Manhattan are the Second Avenue in the extreme east side of the Borough, the Metropolitan on both sides of the Borough, and the Third Avenue with a line in the East side of the Borough, north of the Post Office, and on the West side of the Borough north of 42nd Street. The principle crosstown lines which can be made to connect the systems are the Metropolitan Lines on Eighth Street, 14th Street, Twenty-Third Street, 34th Street, 86th Street, 116th Street, and 145th Street; the Dry Dock, East Broadway, and Battery line on Grand Street, the 28th and 29th streets, crosstown lines, the 42nd Street line and 125th Street line, all operated as part of the Third Avenue system. The Central Park North and East River Railroad Co., on 59th Street now has only the horse cars of the Belt Lines for north and south connections. A transfer privilege that will permit of a journey consisting of three separate rides and yet involve only two railroad systems in the division of the five cent fare will in our opinion serve the public convenience, facilitate an equitable division [fol. 603] of the fare of five cents, and in some measure make it easier to prevent an abuse of the transfer privilege.

Owing to the fact that transfers are now given from crosstown lines of one system to north and south lines of the same system at points of intersection, the addition of one foreign transfer, by which is meant a transfer to the lines of an independent system, will enable passengers for five cents to make a trip to almost any part of the Borough. The lines of the same system under the limitation of the transfer privilege outlined above may be used for any two rides of a three ride journey, and the passenger will in addition be entitled to all transfers now required by law or by agreements of the companies. For example, under such a transfer system a passenger in the northeast section of the Borough could take a Third Avenue Car south, transfer west on 59th Street, retransfer south on any other line of the Central Park, north and east river Railroad Company, on any line of the Third Avenue system, for example, to the Broadway line, and thereafter be entitled to all transfers granted by this last line.

We believe that with this limitation transfers should be ordered at the 151 points shown in the schedules attached to the order of July 11, 1911, at the maximum rate of five cents for a continuous trip in one general direction. The order should take effect January 1, 1912, and should remain in force one year from the time the said joint rate is actually in operation, and the Companies should be directed to agree upon the division of the joint rate and to notify the Commission of their agreement not later than February 10, 1912.

[fol. 604]

Exhibit #17

Manhattan Street Surface Railways

Summary of Operations, 1907-1910

	Fiscal year ending June 30			
	1907	1908	1909	1910
Passenger car miles.....	57,676,104	60,605,040	55,255,497	55,425,835
Revenue " "	57,908,873	60,719,724	55,257,284	55,426,013
Transfers (free)	194,820,920	196,672,167	139,607,266	139,011,581
Revenue passengers	(a)377,017,192	366,690,345	362,077,665	375,888,469
Amount of fares.....	$18,810,457.44	$18,288,979.04	$17,977,252.35	$18,677,788.07
Revenue from transportation	18,860,382.23	18,266,160.39	17,999,309.11	18,678,033.07
Oper. exp. excl. maintenance	8,826,744.60	9,468,620.20	9,228,231.50	8,876,933.67
Oper. expenses (total)....	11,383,557.28	13,817,673.34	13,326,858.06	12,840,596.65
Maint. of way and str....	945,747.45	1,476,035.89	1,813,015.12	(b)2,369,397.94
Maint. of equipment.....	(c) 1,611,065.23	2,873,017.25	2,285,611.44	1,594,365.04
Operation of power plant..	(d) 1,280,760.51	1,328,858.94	1,188,413.52	1,130,701.62
Operation of cars.....	5,045,803.68	5,591,127.36	5,213,125.74	(b)5,300,073.81
General Expenses.....	2,500,180.41	2,549,633.90	2,826,692.24	2,446,158.24

Bureau of Statistics and Accounts.

Thereupon the Commission adopted the following order:

(Certification omitted.)

(a) Reports show "passengers carried including transfers" of an aggregate number of 571,838,112.

(b) The items Cleaning and sanding track and Removal of snow and ice reported under Maintenance of Way and Structures are here included in Operation of Cars as in former years (Total amount $311,649.)

(c) Includes Renewal of horses; other power expense, variously classified in the returns, are included in Operation of Power Plant.

(d) Less power sold (see also preceding note).

[fol. 605] STATEMENT RE EXHIBIT BV-2

Order of Public Service Commission for the First District of the State of New York in case No. 1364, dated December 5, 1911, establishing through routes and joint rates.

(Omitted.)

[fol. 606] EXHIBIT BW

Order of Public Service Commission for the First District of the State of New York in Case No. 1364 case dated December 12, 1911

(Caption and certification omitted.)

An order having been made in the above entitled proceeding on December 5, 1911, and applications for a rehearing as to said order having been made by George W. Linch, as Receiver of the Second Avenue Railroad Company in the City of New York, by petition dated December 5, 1911, and verified December 8, 1911; by Adrian H. Joline and Douglas Robinson, as Receivers of the Metropolitan Street Railway Company, by petition dated and verified December 9, 1911; by Frederick W. Whitridge, as Receiver of the Third Avenue Railroad Company, as Receiver of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, and as Receiver of the Dry Dock, East Broadway and Battery Railroad Company, and by the Kingsbridge Railway Company, by petition dated and verified December 8, 1911, and by the Central Park, North and East River Railroad Company by petition dated December 9, 1911, and verified December 11, 1911, and no sufficient reason for a rehearing having been made to appear.

Now, therefore, it is

Ordered, that each of the said applications for a rehearing be and the same hereby is denied.

By the Commission.

(Signed) Travis H. Whitney, Secretary.

[fol. 607] EXHIBIT BX

Order of Public Service Commission for the First District of the State of New York in Case No. 1364 Dated December 15, 1911

(Caption and certification omitted.)

An order having been made in the above entitled proceeding on December 5, 1911, and an application for a rehearing as to said order having been made by Joseph B. Mayer, as Receiver of the Twenty-eighth and Twenty-ninth Streets Crosstown Railroad Company, by petition dated and verified December 13, 1911, and no sufficient reason for a rehearing having been made to appear,

Now, therefore, it is

Ordered, that said application for a rehearing be and the same hereby is denied.

By the Commission.

(Signed) Travis H. Whitney, Secretary.

[fol. 608] EXHIBIT BY

Order of Public Service Commission for the First District of the State of New York in Case No. 1364 Dated February 13, 1912

(Caption and certification omitted)

The Third Avenue Railway Company having presented to the Commission its petition, dated and verified December 14, 1911, and thereby claiming to be interested in the order of the Commission heretofore and on the 5th day of December, 1911 made in the above entitled proceeding, and to be aggrieved by the provisions of said order upon the grounds stated at length in the application for a rehearing herein, made and filed with this Commission on the 9th day of December, 1911 by Frederick W. Whitridge, as Receiver, and stating that it desires to join in said application for a rehearing on the grounds more particularly stated therein, and praying that it be permitted to intervene in the above entitled proceeding, and become a party thereto with the same force and effect as if it had been a party thereto from the commencement thereof, without prejudice to any of the proceedings already had, and the Commission having duly considered said petition, it is

Ordered, that the Third Avenue Railway Company be and it hereby is permited to intervene in the above entitled proceeding and to become a party thereto with the same force and effect as if it had been a party thereto from the commencement thereof, without prejudice to any of the proceedings already had.

By the Commission,

(Signed) Travis H. Whitney, Secretary.

[fol. 609] EXHIBIT BZ

Petition of New York Railways Company in Case No. 1364

(Caption and certification omitted)

To the Public Service Commission for the First District:

New York Railways Company respectfully petitions to be made a party to this proceeding in place of the Receiver of the Metropolitan Street Railway Company, and that thereupon the Commission grant a re-hearing of the case to the end that a new order regulating the

exchange of transfers for a single five-cent fare may be made which will be accepted by the several companies involved, and result in the discontinuance of the pending court proceedings.

New York Railways Company was not a party to the proceedings leading up to the order in question. That Company took possession and commenced operations on January 1, 1912. A series of conferences were immediately instituted by the representatives of the several railroad companies with the view of ascertaining whether some arrangement could be made which would accomplish the objects above mentioned. As a result of those conferences your petitioner is informed and believes that the several companies will acquiesce in an arrangement for the exchange of transfers upon the lines of their respective systems, using 59th Street as the connecting link, substantially as shown upon the list hereto annexed, with the understanding that such arrangement shall be in place of the plan proposed in the order of the Commission, and that, upon the proposed arrangement becoming effective, the present proceedings in the courts between the Commission and the several railroads and their Receivers shall be discontinued.

A brief statement of the plan shown on the proposed list is as follows:

A

Passengers starting upon 59th Street will be able to transfer in either direction and travel to the ends of the several intersecting avenue lines.

B

Passengers may travel from the New York Railways avenue lines [fol. 610] on the east side above 59th Street, across 59th Street to the New York Railways avenue lines on the west side below 59th Street, and in the opposite direction. Passengers upon the New York Railways avenue lines on the east side below 59th Street may travel across 59th Street to the avenue lines of the New York Railways on the west side above 59th Street, and in the opposite direction.

C

In like manner passengers originating upon the Third Avenue line may travel across 59th Street, and up or down Broadway or Tenth Avenue in the same direction, on the west side, and from Broadway or Tenth Avenue across 59th Street, and up or down Third Avenue, in the same direction, on the east side.

D

Passengers originating upon the lines of the 2nd Avenue Company will be able to travel across 59th Street and have the use, in the same general direction, of either the 8th Avenue line of the New York Railways Company, or the Broadway line of the Third Avenue system. Passengers may also transfer across 59th Street from either

8th Avenue or Broadway to the east side lines of the Second Avenue Company for a trip in the same general direction.

It is understood that the exchange of transfers herein proposed shall be in addition to the transfers which are being exchanged between the several railroads at the present time.

It is expected that the companies will agree among themselves upon the division of the five-cent fare which is to be paid by the passengers for the rides shown upon the list; but in case of a failure to agree, your petitioner is informed and believes that the companies are willing to leave the apportionment to the determination of the Commission.

Your petitioner further states that if this proposed substitute shall meet with the approval of the Commission, diligent efforts will be made by the several parties to devise means for the temporary working of the plan proposed, pending the engraving and printing of the necessary formal coupon tickets, and it is believed that such temporary operation can be commenced on or about the first day of November 1912, although the final order should not take effect before January 1, 1913.

It is understood that this application is made as an effort to compromise the pending litigation, and that all proceedings and negotiations for that purpose shall be without prejudice to any or all of the parties to such litigation, in the event of the failure of the parties and the Commission to agree upon a satisfactory arrangement.

Dated, New York, October 21, 1912.

New York Railways Company, by (Signed) T. P. Shonts, President.

(List of transfers omitted.)

[fol. 611] EXHIBIT CA

Order of Public Service Commission for the First District of the State of New York in Case No. 1364 Dated October 22, 1912

(Caption and certification omitted)

The New York Railways Company having presented to the Commission its petition dated October 21, 1912, thereby claiming to be interested in the order of the Commission heretofore and on the 5th day of December, 1911, made in the above entitled proceeding and to be aggrieved by the provisions of said order, and stating that it desires to make an application for rehearing on the grounds more particularly stated in said petition, and praying that it be permitted to become a party in the above entitled proceeding, and the Commission having duly considered said petition, it is

Ordered, that New York Railways Company be and hereby is permitted to intervene in the above entitled proceedings and to become a party thereto with the same force and effect as if it had been a party thereto from the commencement thereof, without prejudice to any of the proceedings already had.

By the Commission.

(Signed) Travis H. Whitney, Secretary.

[fol. 612] EXHIBIT CB

Resolution of Public Service Commission for the First District of the State of New York in Case No. 1364 Dated October 22, 1912

(Caption and certification omitted)

New York Railways Company having by petition dated October 21, 1912, asked the Commission for leave to intervene in the above entitled proceeding, and an order having been made October 22d, 1912, allowing New York Railways Company to intervene in said proceeding with the same force and effect as if it had been a party thereto from the commencement thereof, and New York Railways Company having in said petition, dated October 21, 1912, asked for a rehearing of the matters contained in a certain order of the Commission made herein December 5, 1911.

Now, therefore, it is

Resolved, that a rehearing upon the matters contained in said order made herein December 5, 1911, be held on the 25th day of October, 1912, at 11:30 o'clock in the forenoon, at the rooms of the Commission No. 154 Nassau Street, Borough of Manhattan, City of New York, to determine whether said final order or any part thereof should be abrogated, changed or modified, and to determine the nature and extent of such changes or modifications, if any.

Further resolved, that notice of this rehearing be given to all parties who appeared in the proceedings leading up to the order of December 5, 1911, by service of a copy of this resolution at least one day prior to the date of said hearing.

By the Commission.

(Signed) Travis H. Whitney, Secretary.

[fol. 613] EXHIBIT CC

Acceptance by Central Park, North and East River Railroad Company of the Commission's Transfer Order of October 29, 1912

Central Park, North and East River Railroad Company

789 Tenth Avenue, New York

November 14th, 1912.

Mr. Travis H. Whitney, Secretary Public Service Commission, 154 Nassau St., City.

DEAR SIR: In further answer to yours of October 31st and also to the Order of the Public Service Commission in Case #1364 of October 29, 1912, will say that we are now, and have been since November 1st, complying with the Order, the terms of which are accepted and will be obeyed by this Company.

Yours very truly, (Signed) John Beaver, Secretary & Treasurer.

[fol. 614] STATEMENT RE EXHIBIT CD

Notification from the New York Railways Company to the Public Service Commission for the First District dated January 10, 1913, as to portion of joint rates to which each company will be entitled on order of October 29, 1912.

Same as exhibit T in this case.

[fol. 615] EXHIBIT CE

Order of Public Service Commission for the First District of the State of New York in Case No. 1364 Dated January 21, 1913

(Caption and certification omitted)

The Commission having made and filed its order herein under date of December 5, 1911 establishing certain through routes and joint rates and in and by said order having adjourned this proceeding pending notification to the Commission as to acceptance of said order or as to agreement for the division of fares, and thereafter New York Railways Company having been allowed to intervene herein as the successor of Adrian H. Joline and Douglas Robinson as receivers of the Metropolitan Street Railway Company, and having applied for rehearing as to said order of December 5, 1911 by petition bearing date October 21, 1912, and said order of December 5, 1911 having been amended by an order of the Commission made and filed herein October 29, 1912 establishing certain through routes and joint rates as therein set forth, said order to take effect

when the Commission should be notified of the acceptance thereof, and it appearing to the Commission that the Commission has been notified of the acceptance of said order and that said order has been put in force,

Ordered that further proceedings before the Commission under and pursuant to order of the Commission made and filed December 5, 1911 be and the same are hereby discontinued.

By the Commission.

(Signed) Travis H. Whitney, Secretary.

[fol.616] EXHIBIT CF

Memorandum of Public Service Commission for the First District of the State of New York in Case No. 1364

(Caption and certification omitted)

By the COMMISSION:

In this case the Commission after a hearing made an order under date of December 5, 1911 requiring the receivers and the companies affected to establish through routes and joint rates and in and by said order adjourned and continued the proceeding pending notification to the Commission as to the acceptance of said order or as to agreement for the division of fares as authorized by the statute in the event that the companies affected should not be able to agree thereon. The receivers or companies did not put this order in force but after a rehearing had been applied for and denied, procured writs of certiorari to review the order of December 5, 1911. In the meantime the further proceeding before the Commission as to the division of the fares has been adjourned until the present time.

The New York Railways Company having been allowed to intervene as successor to Messrs. Joline and Robinson, receivers of the Metropolitan Street Railway Company, made application October 21, 1912 for a rehearing and for modification of the order of December 5, 1911 and after such rehearing had been allowed and a further hearing had, the Commission made an order under date of October 29, 1912 amending the former order and providing in lieu thereof for through routes and joint rates as specified therein substantially in accordance with the application for rehearing, such amended order to take effect only when the Commission should be notified of the acceptance of such amended order. Acceptances have been received and the order of October 29, 1912 has been put in force. The order of December 5, 1911 has accordingly been replaced by the order of October 29, 1912, and there can be no further action required as to any division of fares under the order of December 5, 1911. Further proceedings thereunder should accordingly be discontinued and an order made herein accordingly.

By the Commission.

(Signed) Travis H. Whitney, Secretary.

[fol. 617] EXHIBIT CG

Order of Public Service Commission for the First District of the State of New York in Case No. 1364 Dated July 30, 1914, Discontinuing Further Proceedings Supplementary to Order of October 21, 1912

(Caption and certification omitted)

The Commission having made and filed its order herein under date of October 29, 1912, amending the order made and filed herein on December 5, 1911 and establishing certain through routes and joint rates, and in and by said order having adjourned this proceeding pending notification to the Commission as to the acceptance of said order or as to the agreement for the division of fares, and it appearing to the Commission that the Commission has been notified of the acceptance of said order of October 29, 1912 and that said order has been put in force, it is

Ordered that further proceedings before the Commission under and pursuant to the said order of October 29, 1912, be and the same hereby are discontinued.

By the Commission.

(Signed) Travis H. Whitney, Secretary.

[fol. 618] EXHIBIT CH

Petition of Receiver of New York Railways Company in Case No. 1364

(Caption and certification omitted)

To the Public Service Commission for the First District:

The petition of Job E. Hedges, as Receiver of New York Railways Company, respectfully shows, upon information and belief:

I. Your petitioner was appointed temporary receiver of all of the property of New York Railways Company by an order of the United States District Court for the Southern District of New York, duly entered on March 20, 1919, in a suit brought by the American Brake Shoe and Foundry Company, plaintiff, against said New York Railways Company, defendant. The appointment of your petitioner as such receiver was made permanent during the pendency of such action by a decree of said court entered March 31, 1919. Your petitioner duly qualified under said order and said decree respectively, and is now acting as receiver of the property of said defendant.

II. Upon the appointment of your petitioner as Receiver of New York Railways Company, he found that transfers were being exchanged between the lines of the New York Railways Company and

the Fifty-ninth Street Crosstown line, formerly owned by the Central Park, North and East River Railroad Company, now belonging to the Belt Line Railway Corporation of the Third Avenue Railway Company System, as follows, viz: At 59th Street and Lexington Avenue, 59th Street and Madison Avenue, 59th Street and Sixth Avenue, 59th Street and Seventh Avenue, 59th Street and Eighth Avenue, and 59th Street and Ninth Avenue. Such transfers were being exchanged pursuant to an order of the Public Service Commission, First District, dated October 29, 1912. A copy of this order will be found on page 19 of Exhibit I hereto annexed. Pursuant to the terms of said order, no additional charge was made for a transfer, but a transfer was issued by both the Fifty-ninth Street [fol. 619] Crosstown line and the New York Railways Company lines to a passenger upon request upon the payment of a single fare of 5¢. This transfer, when issued by a line of the New York Railways Company, not only entitled the passenger to ride on the Fifty-ninth Street Crosstown line, but also entitled him to re-transfer to certain other lines of the New York Railways Company. The details of the transfer privilege afforded under this practice will be found in Schedules 1, 2 and 5 attached to the order of the Public Service Commission above mentioned.

This order and the practice followed pursuant thereto, also included the privilege to a passenger on the Eighth Avenue line of the New York Railways Company of receiving a transfer upon the payment of a single fare entitling him to transfer to the Fifty-ninth Street Crosstown line and to re-transfer to the lines of the Second Avenue Railroad, and likewise the privilege to a passenger on the payment of a single fare entitling him to transfer to the Fifty-ninth Street Crosstown line and re-transfer to the Eighth Avenue line of the New York Railways System.

III. Your petitioner as Receiver of the New York Railways Company, upon his appointment continued the practice of exchanging transfers at the points and with the lines above mentioned in compliance with the order of the Public Service Commission of October 29, 1912 above mentioned. By orders of the United States District Court for the Southern District of New York, dated July 15, 1919 and September 26, 1919 respectively, the Eighth and Ninth Avenue Railroad Companies, formerly leased lines of the New York Railways Company were separated from the New York Railways System and returned to the lessors. By an order of the same Court dated January 20th, 1920, the lines of the New York & Harlem Railroad Company, which included the Fourth and Madison Avenue line formerly leased by the New York Railways Company, were separated from the New York Railways system and returned to the lessor as of midnight between January 31st and February 1st, 1920. Upon the separation of said Eighth and Ninth Avenue and New York and Harlem lines from the New York Railways System, your petitioner continued, and is continuing, the exchange of transfers at the remaining points of intersection of the lines of the New York Railways Company, as above described, with the Fifty-ninth Street Cross-

town line. Annexed hereto as "Exhibit III" is a list of the points at which transfers are now being exchanged between the New York [fol. 620] Railways lines and the Fifty-ninth Street Crosstown line and the transfer and re-transfer privileges afforded at such points. Your petitioner is exchanging no re-transfer privileges with the Eighth Avenue, Ninth Avenue and New York and Harlem lines, nor are the Eighth Avenue, Ninth Avenue and New York and Harlem lines exchanging transfers with the Fifty-ninth Street Crosstown lines.

IV. By agreement between the New York Railways Company and the Central Park, North and East River Railroad Company made pursuant to the order of the Public Service Commission, First District, dated October 29, 1912, above mentioned, a division of fares was agreed upon whereby the New York Railways Company received 3¢ of every nickel paid on the lines of the New York Railways Company or on the Fifty-ninth Street Crosstown line of the Central Park, North and East River Railroad Company from passengers transferring between said lines, and the Central Park, North and East River Railroad Company received 2¢ of every nickel so paid. The terms of this agreement are contained in a written notice dated January 10, 1913, to the Public Service Commission for the First District by the New York Railways Company, a copy of which notice is contained on Page 30 of "Exhibit I" hereto annexed. This agreement was continued upon the succession of the Belt Line Railway Corporation of the Third Avenue Railway System to the Ownership of the Fifty-ninth Street Crosstown line. It was further continued by your petitioner upon his appointment as Receiver of New York Railways Company and is still being continued by him and the fares are being divided accordingly.

V. On or about the 24th day of November, 1919, your petitioner presented a petition to the United States District Court for the Southern District of New York, verified November 15, 1919, setting forth the facts as to the exchange of transfers between the New York Railways Company and the Fifty-ninth Street Crosstown line, the division of fares as above indicated, and the order of the Public Service Commission, dated October 29, 1912, pursuant to which said transfers were being exchanged, and setting forth further facts showing that the practice of the exchange of transfers above referred to with the Fifty-ninth Street Crosstown line, was a serious and continuing drain upon the estate of the New York Railways Company in the hands of your petitioner as Receiver in that the revenue received from said transfer passengers was considerably less than the operating cost of [fol. 621] carrying such passengers, without any allowance for rentals of leased lines, interest on bonds or dividends on stock. A copy of said petition, verified November 15, 1919, to the District Court of the United States, for the Southern District of New York, together with the notice of motion, is attached to this petition as "Exhibit I," and your petitioner re-alleges in full the facts and allegations contained in paragraphs "First," "Second," "Fourth," "Fifth," "Sixth," of said petition to the United States District Court and makes the

same a part of this petition as if they were set forth herein at length. By such petition your petitioner prayed the United States District Court for authority to discontinue the practice of exchange of transfers between the lines of the New York Railways System and the Fifty-ninth Street Crosstown line of the Third Avenue Railway System as above indicated.

VI. On November 24, 1919, a hearing was held before the United States District Court after notice to all parties. At said hearing the Court heard arguments by counsel for the Receiver, counsel for the Public Service Commission and counsel representing the City of New York. The City of New York also submitted an affidavit of the Corporation Counsel and an affidavit purporting to be the affidavit of an expert in opposition to the relief prayed for by your petitioner in his petition to the United States District Court. After hearing said arguments and examining the affidavits referred to, the United States District Court for the Southern District of New York made an order dated December 1st, 1919, in which it found that the exchange of free transfers between the lines of the New York Railways Company and the Fifty-ninth Street Crosstown Line at the points at which transfers were then being exchanged, viz: Fifty-ninth Street and Lexington Avenue, and Fifty-ninth Street and Madison Avenue, Fifty-ninth Street and Sixth Avenue, and Fifty-ninth Street and Seventh Avenue, constituted a division of rates and a joint route which is operated at less than cost by the said lines of the New York Railways Company, and thus constituted a most serious and constant loss and drain upon the property and funds in the hands of the Receiver of New York Railways Company, and ordered, therefore, (1) that the Receiver be authorized for the time being and until further order of the Court, to discontinue said interchange of all transfers between said lines at said points and to discontinue the division of all joint rates and fares with the said Fifty-ninth Street Crosstown [fol. 622] line, and (2) however, that the said Receiver apply to the Public Service Commission of the State of New York, First District, for permission to file amendments to the Local and Joint Passenger Tariff Schedule on file with said Commission, or to take any further steps required by Law for an order discontinuing such interchange of transfers with the Fifty-Ninth Street Crosstown line above set forth, and to present this order in connection therewith, and that the discontinuance of said interchange of transfers with said Fifty-ninth Street Crosstown line should become effective forthwith upon an order accordingly of the Public Service Commission of the State of New York, First District. A copy of said order of the United States District Court for the Southern District of New York dated December 1, 1919, is attached to this petition as "Exhibit II."

VII. On January 7th, 1920, your petitioner as Receiver, pursuant to instructions of the United States District Court, presented by petition to the Board of Estimate and Apportionment of the City of New York, a memorandum of Judge Mayer's containing a plan for temporary relief of the serious situation in which the New York Railways system in the hands of your petitioner found itself. It was

hoped that if this relief should be granted, it might be unnecessary to carry out the terms of the order of December 1st, 1919, authorizing your petitioner to discontinue transfers with the Fifty-ninth Street Crosstown line.

Hearings have been held before the Board of Estimate and Apportionment on the plan of Judge Mayer, submitted by your petitioner, but no relief, temporary or otherwise, has been assented to by said Board. From the attitude taken by the said Board of Estimate and Apportionment on the hearings, it is apparent that no relief is to be expected through said application. It, therefore, becomes necessary for your petitioner to carry out the terms of said order of the United States District Court of December 1st, 1919, and pursuant to said order this application is made.

VIII. Your petitioner annexes hereto as Exhibit IV a statement indicating the cost of operation of the New York Railways Company system and the cost of operation per passenger, based on the most recent figures available. This shows the actual operating cost, including taxes assignable to operation but without including any pro-[fol. 623] vision for interest on any bonds, underlying or otherwise, or any rentals for leased lines or dividends on stocks by way of rentals or otherwise.

As shown by said statement, the operating cost per passenger for the six months ended February 29, 1920, was 5.361¢.

The operating cost per passenger for the five months ended January 31st, 1920, which represents a more normal period, eliminating the month of February when the cost was extraordinarily high due to the snowstorms, was 5.183¢.

As above indicated in paragraph IV of this petition, the revenue received by your petitioner from passengers who transfer to the 59th Street Crosstown line is at the most 3¢ per passenger. It is apparent, therefore, that the loss sustained in carrying each of such passengers is, on the basis of the six months period above mentioned, 2.361¢ per passenger, and on the basis of the five months period above mentioned 2.183¢ per passenger.

As indicated in the preceding paragraphs of this petition, many passengers avail themselves of the privilege of retransferring to a second line of the New York Railways system. A passenger thus obtains for 3¢ two rides on New York Railways cars, or at the rate of 1½¢ per passenger per ride. A passenger thus obtaining two rides is considered in calculating the operating cost per passenger as to two passengers. It is thus apparent that the loss sustained by your petitioner in carrying such passengers is, on the basis of the six months period above mentioned, 3.861¢ per passenger, and on the basis of the five months period above mentioned 3.683¢ per passenger.

IX. The serious financial situation of the estate of New York Railways Company which your petitioner is operating as Receiver, and the immediate need for every possible economy is also shown by this same statement. (Exhibit IV.) This statement, shows that for the five months ended January 31, 1920, the system was operated on

an actual operating loss of $463,845.75, representing an average loss of $3,031.67 per day.

The statement also shows that for the six months ended February 29, 1920, the system was operated at an actual operating loss of $613,250.63 representing an average loss of $3,369.51 per day.

The above figures represent merely the excess of operating expenses and taxes over operating revenue. They include no provision for [fol. 624] interest on any bonds, underlying or otherwise, or rentals or dividends on stock in the way of rentals or otherwise.

X. Your petitioner also annexes as Exhibit V a net income statement showing the financial condition of the estate in his custody for the months of January and February 1920. The month of February, due to the snowstorms which resulted in a large decrease in receipts and a large increase in expenses, while not representing a normal situation, indicates the excessive burden which your petitioner was compelled to assume because of conditions beyond his control.

This statement shows that in January 1920 there was a deficit, excluding provision for interest on any bonds, underlying or otherwise, or rentals or dividends on stock in the way of rentals or otherwise, of $82,921.89. This amounts to an average loss of $2,674.90 per day.

It is also shown from this statement that if the interest on certain underlying bonds and bonds of leased lines, not in default, payment of which is necessary to preserve the heart of the system is included, the deficit for the month of January amounts to $170,647.30 or an average loss of $5,504.75 per day.

This statement shows that in February 1920 there was a deficit, excluding provision for interest on any bonds, underlying or otherwise, or rentals or dividends on stock in the way of rentals or otherwise, of $144,838.53. This amounts to an average loss of $4,994.43 per day. It is also shown from this statement that if the interest on certain underlying bonds and bonds of leased lines, not in default, payment of which is necessary to preserve the heart of the system is included, the deficit for the month of February amounts to $232,564.00 or an average loss of $8,019.45 per day.

XI. It is apparent from the above figures how desperate is the financial situation of the estate in the custody of your petitioner as Receiver. It is evident that every possible economy must immediately be effected and that the elimination of all sources of substantial loss must immediately be made. It is no longer merely a question of holding together the remaining elements of the system. The problem is one involving the continuance of any operation at all.

XII. Your petitioner alleges that the present practice of the ex- [fol. 625] change of transfers between the lines of the New York Railways Company and the Fifty-ninth Street Crosstown line, by reason of the facts as found by the United States District Court as stated in paragraph VI herein, by reason of the facts set forth in the petition hereto annexed as Exhibit I, and by reason of the further facts herein set forth, results in rates, fares and charges chargeable

by said New York Railways Company, or its Receiver, insufficient to yield reasonable compensation for the service rendered, and that the present rates, fares and charges for the transportation of persons who avail themselves of said transfer privilege and the regulations and practices affecting such rates are unjust and unreasonable to the Company and to its Receiver. He further alleges that the discontinuance of the exchange of transfers between said lines will not be unjust or unreasonable to the public, and will not yield the said Company or its Receiver and unreasonable compensation for the service rendered, or an unreasonable return upon the value of the property actually used in the public service.

XIII. The exchange of transfers between the lines of the New York Railways Company and the Fifty-ninth Street Crosstown line is not required by the conditions of any municipal consent of the City of New York to any franchise involved, nor is any contract with the City of New York or municipal consent involved in the said exchange of transfers.

XIV. The order of the Public Service Commission dated July 15, 1919, in case 2389, authorizing a charge of 2¢ for transfers between the lines of the New York Railways Company, did not authorize any charge with respect to transfers with lines not belonging to the New York Railways Company system, and, therefore, did not affect the exchange of transfers referred to in this petition.

Wherefore, your petitioner prays that the Public Service Commission relieve your petitioner of the requirements of the order of the public Service Commission dated October 29, 1912, above referred to, in so far as it requires the issuance and acceptance of transfers between the lines of the New York Railways Company and the Fifty-ninth Street Crosstown line of the Central Park, North and East River Railroad Company now belonging to the Belt Line Railway Corporation of the Third Avenue Railway System, and your petitioner [fol. 626] also prays that an order be made herein changing, without the requirement of the thirty days' notice and publication provided by Section 29 of the Public Service Commission Law, its existing Tariff Schedule in accordance with the determination made by the Commissioner on this application.

Dated New York, May 11th, 1920.

(Signed) Job E. Hedges, Receiver New York Railways Company.

(Verification by Receiver, and Exhibits I, III, IV and V, referred to in foregoing Petition are omitted.)

Exhibit II referred to in foregoing Petition, being an order made by the United States District Court for the Southern District of New York in Consolidated Cause, No. E 16-151, is, with the exception of the caption, as follows:

This cause came on further to be heard at this term and was argued by counsel, and it appearing to the Court upon the petition

of Job E. Hedges, as Receiver of the New York Railways Company in the above entitled matter, verified November 15, 1919, and upon all the facts on file and proceedings taken herein, that the interchange of free transfers between the lines of the New York Railways Company and the Fifty-ninth Street Crosstown Line of the Belt Line Railway Corporation belonging to the Third Avenue Railway Company at Fifty-ninth Street and Lexington Avenue, at Fifty-ninth Street and Madison Avenue, at Fifty-ninth Street and Sixth Avenue and at Fifty-ninth Street and Seventh Avenue, constitutes a division of rates and a joint route which is operated at less than cost by the said lines of the New York Railways Company, and thus constitutes a most serious and constant loss and drain upon the property and funds in the hands of said Receiver; it was thereupon, upon consideration thereof,

Ordered:

1. That the said Job E. Hedges, as Receiver of New York Railways Company, be and he hereby is authorized for the time being and until further order of this Court to discontinue the interchange of all transfers between the lines of New York Railways Company and the Fifty-ninth Street Crosstown Line of the Belt Line Railway Corporation, belonging to the Third Avenue Railway Company, at Fifty- [fol. 627] ninth Street and Lexington Avenue, at Fifty-ninth Street and Madison Avenue, at Fifty-ninth Street and Sixth Avenue and at Fifty-ninth Street and Seventh Avenue; and to discontinue the division of all joint rates and fares with the said Fifty-ninth Street Crosstown Line.

2. However, that the said Job E. Hedges, as Receiver of the New York Railways Company be and he hereby is directed to apply to the Public Service Commission of the State of New York, First District, for permission to file amendments to the Local and Joint Passenger Tariff schedule on file with said Commission or to take any other steps required by law for an order discontinuing such interchange of transfers with the Fifty-ninth Street Crosstown Line above set forth, and to present this order in connection therewith, and that the discontinuance of said interchange of transfers with said Fifty-ninth Street Crosstown Line shall become effective forthwith upon an order accordingly of the Public Service Commission of the State of New York, First District.

Dated New York, December 1, 1919.

Julius M. Mayer, U. S. D. J.

[fol. 628] EXHIBIT CI

Order of Public Service Commission for the First District of the State of New York in Case No. 1364, Dated May 18, 1920, Directing Hearing on Application of the Receiver of New York Railways Company

(Caption and certification omitted)

An application having been made by Job E. Hedges, as Receiver of New York Railways Company by petition duly verified the 11th day of May, 1920 for an order authorizing the discontinuance of the exchange of transfers between the lines of New York Railways Company and the Fifty-ninth Street Crosstown Line of the Third Avenue Railway system and modifying or revoking the order of the Public Service Commission, First District, dated October 29, 1912 in respect thereof, it is

Ordered that a hearing be had by and before the Commission upon said application on the 27th day of May, 1920 at ten-thirty (10:30) o'clock A. M. at the Hearing Room of the Commission at No. 49 Lafayette Street, Borough of Manhattan, City of New York.

Further ordered that notice of said hearing be given to the New York Railways Company, the Third Avenue Railway Company and The City of New York.

By the Commission.

(Signed) Frank N. Robinson, Acting Secretary.

[fol. 629] EXHIBIT CJ

Order of Public Service Commission for the First District of the State of New York in Case No. 1364, Dated May 20, 1920, Directing Hearing on Application of the Belt Line Railway Corporation.

(Caption and certification omitted)

An application having been made by the Belt Line Railway Corporation by petition duly verified the 18th day of May, 1920 for an order modifying the order of the Public Service Commission, First District, dated October 29th, 1912, so that the exchange of transfers between the lines operated by the Belt Line Railway Corporation, and the lines operated by all other street surface railway corporations named in said order dated October 29th, 1912, with the exception of Third Avenue Railway Company and The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, shall be discontinued; it is

Ordered that a hearing be had by and before the Commission upon the said application on the 27th day of May, 1920, at 10:30 A. M. at the hearing room of the Commission at No. 49 Lafayette Street, Borough of Manhattan, City of New York, and it is

Further ordered that notice of said hearing be given to the Belt Line Railway Corporation, Job E. Hedges, as Receiver of the New York Railways Company and The City of New York.

By the Commission.

(Signed) James B. Walker, Secretary.

[fol. 630] EXHIBIT CK

Application by Belt Line Railway Corporation for Rehearing in Case No. 1364

Third Avenue Railway System

Legal Department

130th Street and 3rd Avenue, New York

Alfred T. Davison, General Counsel

In the Matter of the Application of THE BELT LINE RAILWAY CORPORATION for modification of the order establishing a joint or through rate between the 59th Street line of the Belt Line Railway Corporation and certain lines of other street railway corporations running north and south in the Borough of Manhattan and intersecting 59th Street.

July Twenty-third, 1920.

Hon. Lewis Nixon, Public Service Commissioner, 49 Lafayette Street, New York City.

SIR: I respectfully ask for a rehearing in the above matter for the following reasons:

The uncontradicted proof before the Commission is that the cost to the Belt Line Railway Corporation for carrying each passenger is 3 41/100 cents, without taking into consideration any depreciation, and without taking into consideration any return on its capital, excepting the interest at 5% on its funded debt. All the capital of the Belt Line Railway Corporation was issued pursuant to orders of the Public Service Commission, determining the value of its property.

The Belt Line Railway Corporation only receives two (2) cents for each passenger carried under the joint rate, and therefore, it very clearly loses 1 41/100 cents on every such passenger, so long as the order of October 29, 1912, remains in force. This is clearly confiscatory. The proposed joint rate of 7 cents is still confiscatory of the [fol. 631] property of the Belt Line Railway Corporation, for the reason that, assuming that the Belt Line Railway Corporation receives one-half of the joint rate, namely, 3½ cents for each passenger, such revenue would still be less than the actual cost of carrying each passenger, without taking into consideration any depreciation, and without taking into consideration any return on the capital, excepting interest at the rate of 5% on the funded debt. It, therefore, is apparent that the joint rate of 7 cents so sought to be established by the Commission, is confiscatory of the property of the Belt Line Railway Corporation.

If a proper allowance for depreciation were considered, and also if a return on the capital (and this means only the capital authorized by the Commission), the cost of transporting each passenger would be approximately five cents.

For the reasons above mentioned, therefore, the joint or through rate should be entirely abolished until such time as the experience of this company shows that a joint rate of less than two full fares is not confiscatory.

A rehearing is further necessary, for the reason that the evidence thus far submitted had no reference to a joint or through rate of 7 cents.

Respectfully submitted, (Sgd.) Alfred T. Davison, Attorney for Belt Line Railway Corporation.

(Certification omitted.)

[fol. 632] EXHIBIT CL

Application by Receiver of New York Railways Company for Rehearing in Case No. 1364

(Caption and certification omitted)

August 28, 1920.

To the Public Service Commission, First District, 49 Lafayette Street, New York City.

SIR: On behalf of Job E. Hedges, the Receiver of New York Railways Company and the petitioner in the above entitled matter, we respectfully ask for a rehearing in the above matter for the following reasons:

The petition presented by the Receiver verified the 11th day of May, 1920, prayed that the petitioner might be relieved of the requirements of the order of the Public Service Commission dated October 29th, 1912, which required the issuance and acceptance of transfers between lines of the New York Railways Company and the Fifty-ninth Street Crosstown line of the Central Park North & East River Railroad Company now belonging to the Belt Line Railway Corporation. The prayer of the petition and the evidence submitted at the hearing was for the purpose of obtaining an order of the commission authorizing the discontinuance of all transfers between the lines operated by the petitioner as Receiver and the Fifty-ninth Street Crosstown line. The order adopted by the Commission on July 9, 1920, in this matter authorized a charge of 2¢ for such transfers which was in effect fixing a joint rate of 7¢. No evidence was presented at the hearings upon the question of the reasonableness or adequacy of such a joint rate of 7¢, and we respectfully request the opportunity to present at a rehearing such evidence.

The evidence presented at the hearings held on the above mentioned petition showed that the cost to the petitioner as Receiver of carrying a passenger on the most narrow calculation possible was over 4½¢. This figure included no provision for reserves, for main-

tenance and depreciation and for accidents and damages, and no provision for any return upon capital or property used in the Public Service, nor any rentals of leased lines. The evidence presented at the hearings further showed that if provision were made for reserves, for [fol. 633] maintenance and depreciation and for accidents and damages, but still excluding all return upon capital or rentals of leased lines, that the cost of carrying such passenger was over 5¢. It was further shown by evidence presented at the hearings that under the present joint rate provisions of the order of October 29th, 1912, your petitioner as Receiver received only 3¢, in some cases, of every nickel paid by the passenger exercising these transfer privileges, and in all other cases only 1½¢ per passenger per ride. In case the charge of 2¢ authorized by the order of the Commission herein dated July 9, 1920, should be put into effect, and in case said 2¢ were divided on the same basis as the nickel is now divided between the Receiver of New York Railways Company and the Belt Line Railway Corporation, the Receiver of the New York Railways Company would receive in some cases 4 1/5¢ per passenger per ride, and in other cases 2 1/10¢. It is apparent from the comparison of these figures that the figures above mentioned which were shown at the hearings as to the cost of carrying passengers with such an additional charge of 2¢, or a joint rate of 7¢, would also be confiscatory, unjust and unreasonable to the Receiver and constitute a rate of fare insufficient to yield a reasonable compensation for the services rendered.

We therefore respectfully request a rehearing in this matter in order that evidence may be presented to show the confiscatory nature of the rate established by said order of July 9, 1920. We also respectfully request that the date of September 1st, 1920, prescribed by said order as the date before which the Receiver of the New York Railways Company shall elect whether he would accept the provisions of said order or not be extended to such date as will offer an opportunity to the Receiver prior thereto for such rehearing and a determination thereon, and that the other dates prescribed in said order as to when the rate established thereby should go into effect, and before which an agreement for the division of such rate should be made between the Receiver and the Belt Line Railways Corporation, be postponed accordingly.

Respectfully submitted, (Signed) Winthrop & Stimson, Solicitors for Job E. Hedges, Receiver New York Railways Company.

[fol. 634] EXHIBIT CM

Order of Public Service Commission for the First District of the State of New York in Case No. 1364, Dated August 31, 1920, Directing Rehearing on Application of the Receiver of New York Railways Company

(Caption and certification omitted)

An order having been duly made by the Commission herein on July 9, 1920, designated order "A," fixing the maximum joint rate, fare or charge to be exacted for through transportation over any through route established by a previous order of the Commission made herein on October 29, 1912, which through route involves a transfer by a passenger from the lines of one to another of the following companies, the New York Railways Company, the Central Park, North and East River Railroad Company and the Second Avenue Railroad Company in the City of New York, commencing September 13, 1920, at the sum of seven cents instead of five cents; and the Commission being now in receipt of a communication dated August 28, 1920, from Winthrop and Stimson, solicitors for Job E. Hedges, Receiver of the New York Railways Company requesting a rehearing in respect of the matters determined in and by said order of July 9, 1920.

Ordered that said application be and the same hereby is granted and that such rehearing be had by and before the Commission at the hearing room of the Commission, No. 49 Lafayette Street, Borough of Manhattan, City of New York, on the 5th day of November, 1920, at 10:30 o'clock in the forenoon.

Further ordered, that the several dates specified in said order of July 9, 1920, on or before which any act is authorized or required to be done or performed by said corporations (or said Receiver), or any of them, be and the same hereby are deferred and postponed until such date or dates as shall or may be fixed by the Commission at or after the termination of said rehearing.

By the Commission.

(Signed) Frank N. Robinson, Acting Secretary.

[fol. 635] EXHIBIT CN

Report of Belt Line Railway Corporation to Public Service Commission, made April 16, 1915, in case No. 1606, of sale of capital stock and bonds pursuant to order of the Commission dated March 19, 1913, and the dispostion of proceeds

To the Public Service Commission, First District:

The following is a report of the sale by Belt Line Railway Corporation of its capital stock and bonds pursuant to an order of the Commission, dated March 19, 1913, in the above entitled case:

1913, March 25th.—Sold $2,181,300 par value of securities, i. e., $1,750,000 First Mortgage 5% Gold Bonds at 95 and 431,300 shares of capital stock at par ($100) realizing $2,083,800 which was applied as follows:

1. To purchase from Edward Cornell of the railroads, property, franchises, and rights heretofore belonging to the Central Park, North and East River Railroad Company, and purchased by said Edward Cornell under decree of foreclosure and sale made February 16, 1911, by the Circuit Court of the United States for the Southern District of New York in an action entitled 'The Farmers Loan and Trust Company, Complainant, against Central Park, North and East River Railroad Company and others, Defendants"	$1, 676, 706. 40
2. To the payment of taxes and liens upon the property so purchased to the amount of	397, 406. 27
3. To the discharge or refunding of obligations of the Belt Line Railway Corporation heretofore incurred and existing to the amount of	19, 687. 33
Total	$2, 093, 800. 00

(Verification omitted.)

[fol. 636] EXHIBIT CO

Report by the Belt Line Railway Corporation to the Public Service Commission, dated April 16, 1915, of sale of its capital stock pursuant to the orders of the Commission and the disposition of the proceeds thereof, in Case No. 1723

To the Public Service Commission, First District:

The following is a report of the sale by Belt Line Railway Corporation of its capital stock pursuant to orders of the Commission, dated November 7, 1913, and December 31st, 1913, in the above entitled case:

1914, March 9th.—Issued $253,000 par value of capital stock for following purposes:

1. For acquisition of 39 storage battery cars with the necessary equipment thereof	$124, 909. 60
2. For the discharge of indebtedness to Third Avenue Railway Company incurred for the acquisition of 40 Third Avenue type storage battery cars	128, 090. 40
	$253, 000. 00

(Verification omitted.)

[fol. 637] EXHIBIT CP

Report of the Belt Line Railway Corporation to the Public Service Commission, verified April 16, 1915, in case No. 1703, of the sale of its capital stock pursuant to order of the Commission and the disposition of the proceeds

To the Public Service Commission, First District:

The following is a report of the sale by Belt Line Railway Corporation of its capital stock pursuant to an order of the Commission, dated July 22, 1913, in the above entitled case.

[fol. 640]

Exhibit CS

Statement Given by Charles E. Hall to Mr. Madden, Chief of Bureau of Valuation, Transit Commission, Showing Property of Belt Line Railway Corporation

Belt Line Railway Corporation

Tax Report, Year Ending December 31st, 1921

88—Classification of Road, Page 41

Line No.	Class, street (a)	From— (b)	To—	Length of road: On streets or other public ways (c)	Length of road: On private right of way (d)	Length of road: Total length of road (e)	Equivalent length of single track: On streets or other public ways (f)	Equivalent length of single track: On private right of way (g)	Equivalent length of single track: Total length of road (h)	Track in preceding columns unused by by respondent (i)
1	Underground Electric Operation:									
2	1—59th Street	First Avenue	10th Avenue	1.555	.....	1.555	3.159	.....	3.159	.....
3	10th Ave. Ent. tracks to C. B. & X over N. of 54th St.			.....	.....	.....	.077	.....	.077	.....
4	Total Underground Electric, Class 1			1.555	.....	1.555	3.236	.....	3.236	.....
5	Underground Electric Operation:									
6	1J—10th Avenue	59th Street	42nd Street	.820	.....	.820	1.652	.....	1.652	1.159
7	Total Underground Electric, Class 1-J			.820	.....	.820	1.652	.....	1.652	1.159
8	Storage Battery Operation:									
9	1—10th Avenue	B. O. from 10th Ave. car barn		.....	.....	.....	.018	.....	.018	.....
				.027	.....	.027	.054	.....	.054	.....
10	" "	Across 42nd Street		.088	.....	.088	.249	.....	.249	.249
11	Corlear Street	Cherry St.	Grand St.	.153	.....	.153	.319	.....	.319	.319
12	E. 14th St.	Avenue "C"	Avenue "B"	.873	.....	.873	1.768	.....	1.768	1.768
13	1st Avenue	42nd Street	59th Street	.011	.....	.011	.022	.....	.022	.022
14	" "	33rd "	34th "	.036	.....	.036	.036	.....	.036	.036
15	Dey Street	Washington St.	Greenwich St.	.102	.....	.102	.102	.....	.102	.102
16	Greenwich Street	Dey Street	9th Avenue	1.290	.....	1.290	2.568	.....	2.568	2.496
17	Total Storage	Battery Class 1								
18	Storage Battery Operation:									
19	1-J—Jackson St.	Cherry St.	Monroe St.	.032	.....	.032	.032	.....	.032	.032
20	East 14th St.	Avenue "B"	Avenue "A"	.117	.....	.117	.246	.....	.246	.246
21	1st Avenue	23rd Street	24th Street	.061	.....	.061	.134	.....	.134	.134
22	" "	24th Street	28th & 29th St.	.200	.....	.200	.446	.....	.446	.446
23	" "	28th & 29th St.	34th Street	.284	.....	.284	.546	.....	.546	.546
24	" "	34th Street	42nd Street	.374	.....	.374	.748	.....	.748	.748
25	Avenue "A"	17th Street	23rd "	.279	.....	.279	.558	.....	.558	.558
26	E. 23rd St.	Avenue "A"	1st Avenue	.134	.....	.134	.268	.....	.268	.268
27	Total Storage Battery Operation Class 1-J			1.481	.....	1.481	2.978	.....	2.978	2.978
28	Grand totals			5.146	.....	5.146	10.434	.....	10.434	6.633

1913, August 4th.—$49,700 par value of capital stock issued to Third Avenue Railway Company toward the acquisition of the railroads, property, franchises and rights heretofore belonging to the Central Park, North and East River Railroad Company and particularly to partially reimburse Third Avenue Railway Company for its expenditure of $51,271.34 to pay special franchise taxes and interest of Central Park, North and East River Railroad Company for the years 1910, 1911 and 1912.

(Verification omitted.)

[fol. 638] EXHIBIT CQ

Belt Line Railway Corporation

Statement Showing Amounts Received from Rent of Building 54th Street and Tenth Avenue

	Years ended June 30th		
	1922	1921	1920
Metropolitan Opera Company	$8,499.98	$8,500.00	$5,583.33
Truck Company of America	17,118.45	1,602.30	.....
Williams Storage Warehouse Co., Inc.	5,347.72	11,961.81	.....
Forty-second Street, Manhattanville & St. Nicholas Ave. Railway Co.	15,600.00	15,600.00	15,600.00
	$46,566.15	$37,664.11	$21,183.33

[fol. 639] EXHIBIT CR

1/8/23. S. P.

Parcel No. A 1.—Sec. 4, Block 1082, Lot 14.

Location.—West side of Tenth Avenue, 53rd and 54th Streets

Building.—The building on this property consists of an old four story brick stable, now used on the ground floor as a car-barn; on the Easterly portion of the second floor for dead storage of automobiles, the remainder of the building is vacant.

The columns on the grade floor are iron, unprotected; beams are wood. On the upper floors the beams and columns are wood.

Equipment.—The equipment consists of a car elevator operated by electricity; one transfer cable on the first floor and automatic sprinkler.

Occupation.—The building is occupied as above stated, on the ground floor as a car-barn, and on a corner portion of the Tenth Avenue front of the second floor, for the dead storage of automobiles.

Condition.—The building is old and in bad state of repair.

Valuation.—The present value of the above property is in my opinion, Five hundred and Thirty-one thousand ($531,000) dollars, all of which is in the land.

Memorandum.—No value is given to the building for the reason that it is available for Railroad uses only.

(Sgd.) Irving Ruland.

(Here follows Exhibit CS, marked side folio page 640)

[fol. 641]

EXHIBIT CT

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON

Belt Line Railway Corporation—59th Street Line

Increase or Decrease in Number of Passengers, Free Transfers Collected and Passenger Revenue by Months, from January, 1921, to Date Compared with Corresponding Month in 1920

Month	Five-cent fares	Two-cent fares	Total revenue passengers	Free transfers	Total passengers	Passenger revenue
1921						
January (a)	101,152	D 132,145	D 30,993	D 4,235	D 35,228	$2,414.70
January (b)	76,531	D 173,180	D 96,649	D 4,235	D 100,884	362.95
February	236,991	86,085	323,076	5,770	328,846	13,571.25
March	152,751	D 198,826	D 46,075	199	D 45,876	3,661.03
April	141,056	D 277,165	D 136,109	D 1,891	D 138,000	1,509.50
May	129,790	D 299,036	D 169,246	D 8,357	D 177,603	508.78
June	119,502	D 291,951	D 172,449	D 5,811	D 178,260	136.08
July	89,433	D 282,870	D 193,437	D 5,559	D 198,996	D 1,185.75
August	99,453	D 270,969	D 171,516	D 3,916	D 175,432	D 446.73
September	113,007	D 346,883	D 233,876	D 961	D 234,837	D 1,287.31

October	113,498	D 388,293	D 274,795	2,876	D 271,919	D 2,090.96
November	129,520	D 346,261	D 216,741	3,249	D 213,492	D 449.22
December	107,746	D 317,148	D 209,402	20,112	D 189,290	D 955.66
1922						
January (a)	187,185	D 471,881	D 284,696	26,680	D 258,016	D 78.37
January (b)	162,564	D 512,916	D 350,352	26,680	D 323,672	D 2,130.12
February	180,215	105,114	285,329	38,796	324,125	11,113.03
March	114,474	D 191,289	D 76,815	48,797	D 28,018	1,897.92
April	76,691	D 277,310	D 200,619	27,808	D 172,811	D 1,711.65
May	80,472	D 301,155	D 220,683	27,181	D 193,502	D 1,999.50
June	84,740	D 292,139	D 207,399	13,549	D 193,850	D 1,605.78
July	35,176	D 232,360	D 197,184	D 7,033	D 204,217	D 2,888.40
August	69,739	D 242,972	D 173,233	8,922	D 164,311	D 1,372.49
September	85,352	D 285,848	D 200,496	2,137	D 198,359	D 1,449.36
October	107,846	D 310,285	D 202,439	D 767	D 203,206	D 813.40
November	112,453	D 289,981	D 177,528	3,585	D 173,943	D 176.97

State of New York, Transit Commission, Bureau of Statistics, November 28, 1922.

(a) As originally reported by corporations.
(b) As adjusted by corporation report for month of April 1920.

[fol. 642]

EXHIBIT CU

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON

Third Avenue Railway Company—Third Avenue Line

Increase or Decreases in Number of Passengers, Transfers Collected and Passenger Revenue by Months, from January 1, 1921, to Date, Compared with Corresponding Month in 1920

Month	Five-cent fares	Three-cent fares	Total revenue passengers	Free transfers collected	Total passengers carried	Passenger revenue
1921						
January	285,519	16,147	301,666	136,090	437,756	$14,760.36
February (a)	1,407,677	157,472	1,565,149	324,079	1,889,228	75,108.01
March	742,380	141,320	883,700	282,237	1,165,937	41,358.60
April	438,827	142,470	581,297	202,441	783,738	26,215.45
May	342,027	149,552	491,579	219,066	710,645	21,587.91
June	312,543	155,297	467,840	203,966	671,806	20,286.06
July	263,178	131,307	394,485	172,437	566,922	17,098.11
August	238,571	142,065	380,636	195,750	576,386	16,190.50
September	335,400	135,853	471,253	130,283	601,536	20,845.59
October	246,240	124,723	370,963	124,541	495,504	16,053.69

E

Ca

BELT LINE R

Receiver New York Railwa

Increases or Decreases in Number of Passengers, Transfers C
Compared with C

Month	Seven-cent fares (a)	Five-cent fares	Three-cent fares (b)
1921:			
January	D 59,265	413,668	39,92
February (c)	75,540	877,798	D 101,27
March	12,066	501,298	D 166,48
April	D 9,547	406,186	D 176,86
May	D 21,482	274,482	D 178,03
June	D 26,387	213,104	D 171,92
July	D 21,671	173,376	D 160,26
August	D 21,165	52,162	D 151,20
September	D 18,022	189,506	D 171,96
October	D 19,362	126,917	D 191,88
November	D 15,218	101,711	D 192,18
December	D 16,944	66,685	D 191,79
1922:			
January	D 83,698	355,585	D 143,55
February (c)	59,479	808,915	D 101,27
March	D 479	495,422	D 166,48
April	D 21,914	387,072	D 176,80
May	D 23,975	458,159	D 178,03
June	D 38,064	195,594	D 171,92
July	D 39,764	64,645	D 160,26
August	D 29,100	70,698	D 151,20
September	D 32,013	87,048	D 171,93
October	D 28,205	201,520	D 191,88
November	D 26,622	202,707	D 192,18

State of New York—Transit Commission, Bureau of Sta
HSF—TMT.

NOTE.—D designates decrease.
(a) Five cent passengers purchasing two cent transfers are classif
(b) Transfer agreement with Belt Line Railway Corporation was
(c) On account of severe snow storms during February 1920, the
cult or impossible for several weeks.

EXHIBIT CV

Case No. 1364

E RAILWAY CORPORATION

v.

NEWTON

ways Company—Lexington Avenue Line

Collected and Passenger Revenue by Months from January, 1921, to Date
Corresponding Month in 1920

..res	Total revenue passengers	Two-cent transfers collected	Free transfers collected	Total passengers carried	Passenger revenue
920	394,323	D 46,901	D 161	347,261	$17,732.45
272	852,066	70,072	25,525	947,663	46,139.54
480	346,884	10,295	D 6,595	350,584	20,915.12
862	219,777	D 18,315	D 14,187	187,275	14,335.15
035	74,965	D 25,106	D 11,206	38,653	6,879.31
921	14,796	D 36,873	D 9,754	D 31,831	3,650.48
267	D 8,562	D 37,176	D 4,178	D 49,916	2,343.82
201	D 120,204	D 13,277	D 8,725	D 142,206	D 3,409.48
966	D 482	D 14,626	D 3,268	D 18,376	3,054.78
881	D 84,326	D 11,759	D 14,275	D 110,360	D 765.92
184	D 105,691	3,018	D 8,349	D 111,022	D 1,745.23
791	D 142,050	D 1,700	D 15,144	D 158,894	D 3,605.56
550	128,337	D 57,940	D 14,838	55,559	$7,613.89
272	767,122	68,639	29,235	864,996	41,571.12
480	328,463	3,133	D 4,344	327,252	19,743.17
862	188,296	D 27,093	D 19,422	141,781	12,513.76
035	256,149	D 30,116	D 15,279	210,754	15,888.65
921	D 14,391	D 42,273	D 12,341	D 69,005	1,957.59
267	D 135,386	D 45,709	D 8,214	D 189,309	D 4,359.24
201	D 109,603	D 9,030	D 11,806	D 130,439	D 3,038.13
966	D 116,931	D 12,508	D 9,291	D 138,730	D 3,047.49
881	D 18,566	D 3,642	D 15,100	D 37,308	2,345.22
184	1,771	17,031	D 15,038	3,764	D 3,628.96

Statistics, Dec. 8, 1922.

ssified as seven-cent passengers.
as terminated as of February 1, 1921.
e tracks and conduits were filled with snow, hail and ice, making normal operations diffi-

November	282,528	128,089	410,617	133,225	543,842	17,969.07
December	248,496	142,382	390,878	121,317	512,195	16,696.26
1922						
January	404,922	136,987	541,909	225,145	767,054	$24,355.71
February (a)	1,630,077	189,751	1,819,828	367,204	2,187,032	87,196.38
March	899,008	170,492	1,069,500	315,046	1,384,546	50,065.16
April	570,371	172,640	743,011	222,893	965,904	33,697.75
May	505,117	176,076	681,193	246,492	927,685	30,538.13
June	370,066	180,945	551,011	210,659	761,670	23,931.65
July	212,817	181,922	394,739	152,292	547,031	16,098.51
August	199,701	168,292	367,993	194,244	562,237	15,033.81
September	192,706	183,346	376,052	109,642	485,694	15,135.68
October	129,423	197,400	326,823	107,702	434,525	12,393.15
November	198,360	173,736	372,096	114,508	486,604	15,130.08

State of New York, Transit Commission, Bureau of Statistics, December 7, 1922.

HSF/DR.

(a) On account of severe snow storms during February, 1920, the tracks and conduits were filled with snow, hail and ice, making normal operations difficult or impossible for several weeks.

(Here follows Exhibit CV, marked side folio page 643.)

[fol. 644]

EXHIBIT CW

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON

Receiver, Second Avenue Railroad Company in the City of New York—Second Avenue Line

Increases or Decreases in Number of Passengers, Transfers Collected, and Passenger Revenue by Months from January 1, 1921, to Date, Compared with Corresponding Month in 1920

Month	Five-cent fares	Three-cent fares	Total revenue passengers	Free transfers collected	Total passengers carried	Passenger revenue
1921:						
January	D 43,241	D 16,493	D 59,734	D 862	D 60,596	D $2,656.84
February (a)	429,073	D 14,000	415,073	12,762	427,835	21,033.65
March	282,945	D 38,279	244,666	11,164	255,830	12,998.87
April	20,448	D 62,271	D 41,823	4,253	D 37,570	D 845.73
May	D 110,326	D 61,432	D 171,758	1,064	D 170,694	D 7,359.26
June	D 33,616	D 62,807	D 96,423	2,788	D 93,635	D 3,565.01
July	D 24,867	D 56,371	D 81,238	1,986	D 79,252	D 2,934.48
August	D 65,091	D 49,706	D 114,797	1,733	D 113,064	D 4,745.73
September	6,939	D 58,270	D 51,331	2,559	D 48,772	D 1,401.15
October	D 46,041	D 68,927	D 114,968	D 1,888	D 116,856	D 4,369.86

November	33,714	D 55,971	D 22,257	D 516	D 22,773	6.57
December	38,640	D 51,480	D 12,840	D 1,417	D 14,257	387.60
1922:						
January	D 7,783	D 67,734	D 75,517	D 3,644	D 79,161	D $2,421.17
February (a)	509,064	D 14,588	494,476	11,753	506,229	25,015.56
March	373,699	D 38,279	335,420	8,835	344,255	17,536.57
April	124,528	D 62,271	62,257	1,716	63,973	4,358.27
May	64,935	D 61,432	3,503	D 640	2,863	1,403.79
June	2,715	D 62,807	D 60,092	D 3,157	D 63,249	D 1,748.46
July	D 43,441	D 56,371	D 99,812	D 5,158	D 104,970	D 3,863.18
August	D 74,638	D 49,706	D 124,344	D 3,699	D 128,043	D 5,223.08
September	D 1,744	D 58,270	D 60,014	D 2,990	D 63,004	D 1,835.30
October	968	D 68,927	D 67,959	D 4,708	D 72,667	D 2,019.41
November	134,347	55,971	78,376	368	78,744	5,038.22

State of New York—Transit Commission, Bureau of Statistics, Dec. 7, 1922.
HSF/TMT.

NOTE.—D designates decrease.
(a) On account of severe snow storms during February, 1920, the tracks and conduits were filled with snow, hail and ice, making normal operations difficult or impossible for several weeks.

[fol. 645]

EXHIBIT CX

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON

The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company—Broadway Branch (b)

Increases or Decreases in Number of Passengers, Transfers Collected and Passenger Revenue by Months from January 1, 1919, to Date, Compared with Corresponding Month in 1920

Month	Five-cent fares	Three-cent fares	Total revenue passengers	Free transfers collected	Total passengers carried	Passenger revenue
1921:						
January	210,691	1,927	212,618	110,055	322,673	$10,592.36
February (a)	928,656	135,701	1,064,357	155,727	1,220,084	50,503.83
March	344,184	67,695	411,879	142,020	553,899	19,240.05
April	260,285	54,711	314,996	142,577	457,573	14,655.58
May	233,976	45,242	279,218	130,397	409,615	13,056.06
June	289,951	37,896	327,847	125,183	453,030	15,634.43
July	323,410	37,911	361,321	112,962	474,283	17,307.83
August	220,965	41,275	262,240	115,255	377,495	12,286.50
September	262,810	24,976	287,786	66,089	353,875	13,889.78
October	199,262	43,189	242,451	46,037	288,488	11,258.77

November	213,085	49,013	262,098	42,149	304,247	12,124.64
December	221,075	65,893	286,968	40,259	327,227	13,030.54
1922:						
January	316,129	35,762	351,891	142,291	494,182	$16,879.31
February (a)	1,086,090	122,451	1,208,541	182,762	1,391,303	57,978.03
March	486,178	46,060	532,238	167,411	699,649	25,690.70
April	420,679	22,396	443,075	162,000	605,075	21,705.83
May	412,812	16,599	429,411	152,145	581,556	21,138.57
June	403,870	12,060	415,930	138,644	554,574	20,555.30
July	325,800	37,806	363,606	121,085	484,691	17,424.18
August	363,476	43,045	406,521	132,712	539,233	19,465.15
September	377,239	38,518	415,757	74,739	490,496	20,017.49
October	410,639	48,520	459,159	50,363	509,522	21,987.55
November	339,300	59,646	398,946	50,835	449,781	18,754.38

State of New York—Transit Commission, Bureau of Statistics, December 28, 1922.
HSF/TMT.

NOTE.—D denotes decrease.

(a) On account of severe snow storms during February, 1920, the tracks and conduits were filled with snow and ice, making normal operations difficult or impossible for several weeks.

(b) The route of the Broadway Branch is from 42d Street Ferry to 7th Avenue north to Broadway, west to Manhattan Street, east to Amsterdam Avenue and St. Nicholas Avenue to Broadway, north to 181st Street.

[fol. 646]

Exhibit CY

Case No. 1364

Belt Line Railway Corporation

v.

Newton

The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company—Tenth Avenue Line

Increases or Decreases in Number of Passengers, Transfers Collected and Passenger Revenue, by Months, from January 1, 1919, to Date, Compared with Corresponding Month in 1920

Month	Five-cent fares	Free transfers collected	Total passengers carried	Passenger revenue
1921:				
January	25,021	6,549	31,570	$1,251.05
February (a)	265,994	37,165	303,159	13,299.70
March	70,669	18,997	89,666	3,533.45
April	54,605	19,670	74,275	2,730.25
May	19,928	3,345	23,273	996.40
June	33,928	D 1,504	32,424	1,696.40
July	22,454	D 5,806	16,648	1,122.70
August	8,958	D 2,317	6,641	447.90
September	18,899	D 432	18,467	944.95
October	6,911	655	7,566	345.55
November	28,876	6,490	35,366	1,443.80
December	31,841	3,562	35,403	1,592.05

Note.—D designates decrease.

(a) On account of severe snow storms during February, 1920, the tracks and conduits were filled with snow and ice, making normal operations difficult or impossible for several weeks.

EXHIBIT CY—Continued

Month	Five-cent fares	Free transfers collected	Total passengers carried	Passenger revenue
1922:				
January	52,540	6,874	59,414	$2,627.00
February (a)	310,001	41,437	351,438	15,500.05
March	97,371	21,649	119,020	4,868.55
April	76,214	18,372	94,586	3,810.70
May	58,845	7,198	66,043	2,942.25
June	34,224	174	34,398	1,711.20
July	10,643	D 5,877	4,766	532.15
August	5,949	D 2,725	3,224	297.45
September	4,042	D 3,509	533	202.10
October	11,195	D 336	10,859	559.75
November	20,124	3,037	23,161	1,006.20

State of New York—Transit Commission, Bureau of Statistics, December 30, 1922.
HSF/TMT.

NOTE.—D designates decrease.
(a) On account of severe snow storms during February, 1920, the tracks and conduits were filled with snow and ice, making normal operations difficult or impossible for several weeks.

EXHIBIT CZ

Case No. 1364

BELT LINE RAILWAY CORPORATION
v.
NEWTON

Belt Line Railway Corporation

Condensed Income Statement for the Month of September, 1922, and for the Three Months Ended September 30, 1922, Compared with Corresponding Months of Preceding Year

Month of Sept., 1922	Item	Three months ended Sept. 30, 1922	Three months ended Sept. 30, 1921	Increase or (D) decrease
*$40,461.58	Passenger revenue	$113,049.91	$115,809.17	D $2,759.26
787.93	Advertising and other privileges	2,288.31	2,250.57	37.74
2,952.53	Rent of land, buildings, etc	8,657.85	13,899.00	D 5,241.15
62.50	Rent of tracks and terminals	187.50	187.50	.....
$44,264.54	Total street railway operating revenue	$124,183.57	$132,146.24	D $7,962.67
$6,069.24	Maintenance of way and structures	$16,957.51	$17,371.38	D $413.87
4,046.15	Maintenance of equipment	11,304.97	11,680.91	D 275.94
2,938.27	Operation of power plant (power purchased)	8,662.19	8,932.67	D 270.48
13,553.32	Operation of cars	40,143.25	43,545.39	D 3,402.14
2,427.69	Injuries to persons and property	6,782.99	7,048.55	D 265.56
2,107.62	General and miscellaneous expenses	5,704.50	6,930.48	D 1,225.96
$31,139.29	Total street railway operating expenses	$89,555.41	$95,409.38	D $5,853.97
3,759.39	Taxes assignable to street railway operations	11,191.68	11,369.64	D 177.96
$9,365.86	Income from street railway operations	$23,436.48	$25,367.22	D $1,930.74
101.12	Non-operating income	328.75	744.29	D 415.54
$9,466.98	Gross income applicable to corporate and leased properties	$23,765.23	$26,111.51	D $2,346.28

$7,596.22	Interest deductions	$22,788.65	$22,768.66	.....
2,145.00	Rent deductions	6,931.40	7,452.00	D $520.60
243.05	Other deductions from income	729.15	729.15	.....
$9,984.27	Total income deductions	$30,449.20	$30,969.80	D $520.60
Loss $517.29	Net corporate income	Loss $6,683.97	Loss $4,658.29	D $1,826.66

*NOTE.—

Month of September, 1922

Number	Revenue passengers	Amount of revenue
608,514	At 5 cents	$30,425.70
501,794	At 2 cents	10,035.88
1,110,308	Total	$40,461.58
22,766	Transfers collected	.....

From monthly report of corporation filed with the Transit Commission.

State of New York, Transit Commission. Bureau of Statistics, November, 1922.

BSF:DR.

EXHIBIT DA

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON

Belt Line Railway Corporation

Condensed Income Statement for the Month of October, 1922, and for the Four Months Euded October 31, 1922, Compared with Corresponding Months of Preceding Year

Month of October, 1922	Item	Four months ended October 31, 1922	Four months ended October 31, 1921	Increase or (D) decrease
*$47,077.13	Passenger revenue	$160,127.04	$161,608.74	D $1,481.70
750.19	Advertising and other privileges	3,038.50	3,000.76	37.74
2,775.73	Rent of land, buildings, etc	11,433.58	18,414.33	D 6,980.75
38.75	Rent of Equipment	38.75	.....	38.75
62.50	Rent of tracks and terminals	250.00	250.00	.....
$50,704.30	Total street railway operating revenue	$174,887.87	$183,273.83	D $8,385.96
$7,061.57	Maintenance of way and structures	$24,019.08	$24,241.32	D $222.24
4,707.71	Maintenance of equipment	16,012.68	16,160.86	D 148.18
3,271.04	Operation of power plant (power purchased)	11,933.23	11,783.21	150.02
13,778.99	Operation of cars	53,922.24	57,597.16	D 3,674.92
2,824.62	Injuries to persons and property	9,607.61	9,796.52	D 188.91
1,859.06	General and miscellaneous expenses	7,563.56	8,988.10	D 1,424.54
$33,502.99	Total street railway operating expenses	$123,058.40	$128,567.17	D $5,508.77
4,823.26	Taxes assignable to street railway operations	16,014.94	15,241.72	773.22
$12,378.05	Income from street railway operations	$35,814.53	$39,464.94	D $3,650.41
87.39	Non-operating income	416.14	1,021.02	D 604.88
$12,465.44	Gross income applicable to corporate and leased properties	$36,230.67	$40,485.96	D $4,255.29

$7,596.21	Interest deductions	$30,384.86	$30,384.86	.....
2,216.50	Rent deductions	9,147.90	9,845.20	D $697.30
243.05	Other deductions from income	972.20	972.20	.....
$10,055.76	Total income deductions	$40,504.96	$41,202.26	D $697.30
$2,409.68	Net corporate income	Loss $4,274.29	Loss $715.30	D $3,557.99

*NOTE.—

Month of October, 1922

Number	Revenue passengers	Amount of revenue
710,095	At 5 cents	$35,504.75
578,619	At 2 cents	11,572.38
1,288,714	Total	$47,077.13
15,875	Transfers collected	.....

From monthly report of corporation filed with the Transit Commission.

State of New York, Transit Commission. Bureau of Statistics, December 8, 1922.

HSF/CWT.

EXHIBIT DB

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON

Belt Line Railway Corporation

Condensed Income Statement for the Month of November, 1922, and for the Five Months Ended November 30, 1922, Compared with Corresponding Months of Preceding Year

Month of Nov., 1922	Item	Five months ended Nov. 30, 1922	Five months ended Nov. 30, 1921	Increase or (D) decrease
*$45,003.55	Passenger revenue	$206,130.59	$207,340.04	D $1,209.45
750.19	Advertising and other privileges	3,788.69	3,750.95	37.74
3,310.05	Rent of land, buildings, etc.	14,743.63	22,746.66	D 8,003.03
37.50	Rent of equipment	76.25	.....	76.25
62.50	Rent of tracks and terminals	312.50	312.50	.....
$50,163.79	Total street railway operating revenue	$225,051.66	$234,150.15	D $9,098.49
6,900.54	Maintenance of way and structures	$30,919.62	$31,151.02	D $231.40
4,600.35	Maintenance of equipment	20,613.03	20,733.99	D 120.96
3,192.58	Operation of power plant (power purchased)	15,125.81	14,749.93	375.88
13,636.60	Operation of cars	67,558.84	70,840.82	D 3,281.98
2,760.21	Injuries to persons and property	12,367.82	12,540.39	D 172.57
1,769.06	General and miscellaneous expenses	9,332.62	10,838.76	D 1,506.14
$32,859.34	Total street railway operating expenses	$155,917.74	$160,854.91	D $4,937.17
3,816.33	Taxes assignable to street railway operations	19,831.27	10,111.72	719.55
$13,488.12	Income from street railway operations	$49,302.65	$54,183.52	D $4,880.87
134.10	Non-operating income	550.24	1,368.02	D 817.78
$13,622.22	Gross income applicable to corporate and leased properties	$49,852.89	$55,551.54	D $5,696.65

$7,596.22	Interest deductions	$37,981.08	$37,981.08	.....
2,145.00	Rent deductions	11,292.90	12,161.20	D $868.30
243.05	Other deductions from income	1,215.25	1,215.25	.....
$9,984.27	Total income deductions	$50,489.23	$51,357.53	D $868.30
$3,637.95	Net corporate income	Loss $636.34	$4,194.01	D $4,830.35

*NOTE.—Passenger Statistics for the Month of November, 1922.

Number	Revenue passengers	Amount of revenue
702,639	At 5¢	$35,131.95
543,580	At 2¢	10,871.60
1,246,219	Total	$46,003.55
21,398	Transfers Collected	.....

From monthly report of corporation filed with the Transit Commission.

State of New York, Transit Commission. Bureau of Statistics, January 15, 1923.

HSF/TC.

[fol. 650]

EXHIBIT DC

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON

Belt Line Railway Corporation

Condensed Income Statements for the Fiscal Year Ended June 30, 1922, Compared with Preceding Fiscal Year.

Item	Fiscal year ended June 30, 1922	Fiscal year ended June 30, 1921		Increase or (D) decrease
Passenger revenue	$519,402.49	$565,729.21	D	$46,326.72
Advertising and other privileges	9,228.74	9,174.31		54.43
Rent of land, buildings, etc.	46,566.15	37,664.11		8,902.04
Rent of tracks and terminals	750.00	750.00		.....
Total street railway operating revenue	$575,947.38	$613,317.63	D	$37,370.25
Maintenance of way and structures	$77,910.37	$99,737.68	D	$21,827.31
Maintenance of equipment	51,940.25	55,898.11	D	3,957.86
Operation of power plant (power purchased)	36,396.97	56,611.71	D	20,214.74
Operation of cars	168,841.91	221,968.60	D	53,126.69

Injuries to persons and property	25,970.12	39,601.01	D	13,630.89
General and miscellaneous expenses	25,111.42	25,740.98	D	629.56
Total street railway operating expenses	$386,171.04	$499,558.09	D	$113,387.05
Taxes assignable to street ry. operations	47,820.98	45,783.28		2,037.70
Income from street railway operations	$141,955.36	$67,976.26		$73,979.10
Non-operating income	4,579.59	2,566.13		2,013.46
Gross income applicable to corporate and leased properties	$146,534.95	$70,542.39		$75,992.56
Interest deductions	$92,038.30	$91,154.60		$883.70
Rent deductions	28,527.60	30,249.50	D	1,721.90
Other deductions from income	2,916.60	2,916.60		.....
Total income deductions	$123,482.50	$124,320.70	D	$838.20
Net corporate income	$23,052.45 Loss	$53,778.31		$76,830.76

From annual report of corporation filed with the Transit Commission.
State of New York, Transit Commission, Bureau of Statistics, October 16, 1922.

HSF/DR.

[fol. 651] EXHIBIT "DD"

Law Office of Winthrop & Stimson, Mutual Life Building, No. 32 Liberty Street, New York

Cable Address: "Winstim"

Bronson Winthrop, Henry L. Stimson, Egerton L. Winthrop, Jr., Albert W. Putnam, Charles T. Payne, George Roberts, Francis L. Robbins, Jr., Allen T. Klots, Frederick W. Stelle, Percy W. Crane, James N. Dunlop, John M. Bovey

November 29, 1920.

Counsel for the Public Service Commissioner, Public Service Commission, First District, 49 Lafayette Street, New York City, N. Y.

Attention Mr. Mullins

DEAR SIR: We enclose herewith a list of proposed corrections to the record on the rehearing of case #1364 before the Public Service Commission in re the application of New York Railways and Belt Line Railway Corporation as to exchange of transfers on Fifty-ninth Street.

Will you kindly let us know whether you have any objection to any of these corrections in order that we may forward them to the stenographer to be incorporated in the record.

Very truly yours, (Sgd.) Winthrop & Stimson.

Enclosure.

[fol. 652] EXHIBIT DD Continued

Corrections to Record in re Hearing of Case #1364, Application of New York Railways and Belt Line Railway Corporation Before the Public Service Commission, First District

The following corrections should be made to the minutes of the hearing on November 5, 1920, besides those referred to and corrected on pages 81-83 of the record:

Page 51, 9th line from bottom; the word "have" should be "has." The word "could" at end of line should be "should."

Page 56; the last line should read "The joint rate riding is during the rush hours."

Page 57; eighth line from top; insert "were" between "passengers" and "carried." 6th line from bottom, insert the word "business" after the word "day." The word "day" should be "days."

Page 59, 7th line from bottom; insert "transfer" before "traffic." The word "large" should be "lost."

Page 60, 3rd line from bottom; insert "more than" before "40."

Page 61, 4th line from top; strike out the word "are," 5th line,

begin a new sentence with the word "if." 7th line, insert the word "there" between "more" and "than." 8th line, insert "of free transferring" before the word "but."

Page 62, 3rd line; the word "with" should be "by."

[fol. 653] EXHIBIT DD Continued

Minutes of Hearing November 10, 1920

Page 96, 2nd line from top; the word "and" should be "would." 7th line, the word "on" should be "from."

Page 99; 9th line from bottom the word "your" should be "our."

Page 100; 8th line from bottom insert the words "in certain cases" after "one and one-half cents."

Page 101; 4th line from top; insert the word "from" after "passengers." 5th line, strike out the word "from."

Page 102; 7th line from top the word "up" should be "on."

Page 104; 10th line from top; the word after "you have" should be "on."

Page 105; 2nd line from bottom; the word "taking" should be "tagging."

Page 110, 5th line from the top; insert after "and" the words "one on the." 6th line, insert after "passengers" the words "on the car." The 10th line should read "of feet of distance to get the passenger feet ridden." 12th line; insert before "on" the words "add the number getting." 14th line; after the word "points" insert "etc." 15th line, last word should be "feet" not "seats." 17th line, after "and" insert "dividing that by the number of passengers"; strike out the word "that." 3rd line from bottom, before the word "passenger" insert the word "individual." After the word "passenger" insert "for a single fare."

Page 111, 2nd line from the bottom, the word "tariff" should be "tally."

Page 122, 8th line from the bottom; the last word "that" sshould be "an act."

[fol. 654] EXHIBIT DD Continued

Page 125, 5th line from the bottom; strike out "There does not show"; insert "is that the three cent passengers are to be considered as distinct from."

Page 130, 5th line from the bottom; the figure "55" should be "45"; 4th line from the bottom, the figure "55" should be "45." (See page 57.)

Page 153, 1st line; the word "Frank" should be "Frederic C." Strike out word "across" in last line.

Page 154, 1st line, strike out words "the crosstown lines."

Page 155, 4th line from the top; the word "goes" should be "went."

Page 156, 7th and 8th lines from the top; strike out "that all of the five cent passengers who boarded"; 9th line, strike out "five

cents"; 11th line, insert after "the" "passengers on all." 7th line from the bottom, insert before "used," "a man who receives a transfer will." The word "used" should be "use."

Page 157, 2nd line; the word "lose" should be "hold." 3rd line, strike out the word "rights"; insert in its place "while riding on the crosstown line." 7th line; the word "on" should be "to"; 11th line, after the word "transfer" insert "from the Avenue lines"; 12th line, after the word "those" insert "seventy-five cent"; 13th line, after the word "be" insert "passengers who had." After the word "transferred" insert "to the Avenue lines."

[fol. 655] EXHIBIT DE

December 7, 1920.

Messrs. Winthrop & Stimson, 32 Liberty Street, New York City.

GENTLEMEN: We have looked over the proposed correction of the record in Case No. 1364 before this Commission in re the application of the New York Railway and Belt Line Railway Company for the discontinuance of free transfers. The corrections which you suggest are perfectly satisfactory to us with the exception of the correction proposed in the last line of Page 56 of the minutes of November 5th. The correction which you propose would make it appear that the greater part of the transfer passengers are carried in the rush hour period. The wording of the record which you propose to change would indicate otherwise and it is perfectly obvious from other portions of the record immediately following that the greater portion of the transfer passengers are carried in the non-rush hour periods.

Will you kindly check this up again and if you still insist that the records should be changed in that respect, communicate with us further.

Yours very truly, (Sgd.) Terence Farley.

[fol. 656] EXHIBIT DF

Law Office of Winthrop & Stimson, Mutual Life Building, No. 32 Liberty Street, New York

Cable Address: "Winstim"

Bronson Winthrop, Henry L. Stimson, Egerton L. Winthrop, Jr., Albert W. Putnam, Charles T. Payne, George Roberts, Francis L. Robbins, Jr., Allen T. Klots, Frederick W. Stelle, Percy W. Crane, James N. Dunlop, John M. Bovey

December 16, 1920.

Terence Farley, Esq., Counsel for Public Service Commission, First District, 49 Lafayette Street, New York City.

DEAR SIR: We have your letter of December 7th in reply to our letter containing suggested corrections of the minutes of the rehearing in case #1364 in re application of the New York Railways and Belt Line Railway Corporation for the discontinuance of free transfers on 59th Street. We note that the corrections suggested by us are satisfactory to you with one exception.

The correction which you except to is the one at the bottom of page 56. Now that you call our attention to it we can see that this might seem ambiguous. What is meant by the answer of Mr. Wood is that during the rush hours the proportion of joint rate passengers to 5¢ passengers is greater than the proportion of joint rate passengers to 5¢ passengers during the non-rush hours. This is clear from Mr. Wood's testimony on page 57. At page 57 he testified that 63% of all passengers, including transfer and revenue passengers travelled during the non-rush hours, and 37% during rush hours, whereas only 55% of the revenue transfer passengers travelled during the non-rush hours and 45% of those passengers travelled during the rush hours. We therefore suggest that the answer to this question be corrected to read as follows:

"Yes, but the proportion of joint rate passengers to 5¢ passengers is greater during the rush hours than in the non-rush hours." Or [fol. 657] the answer might read as follows:

"Yes, but while during the day the greater number of revenue transfer passengers were carried during the non-rush hours, their proportion to other passengers was greater during the rush hours."

If this correction is satisfactory to you, will you kindly inform us. Will you also inform us what it is necessary to do to have these corrections incorporated in the record. Will the Commission attend to this or must we take it up with the stenographer.

We sent a copy of the suggested corrections to the City of New York at the same time as we sent them to you. No answer has been received from the City.

Yours very truly, (Sgd.) Winthrop & Stimson. (K.)

EXHIBIT DG

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON

Belt Line Railway Corporation, 59th Street Line

Comparative Statement, by Years, for Each of the Months from 1918 to Date, Showing the Number of Revenue Passengers, Free Transfers Collected, and Passenger Revenue

Month	Five-cent fares	Two-cent fares	Total revenue passengers	Free transfers collected	Total passengers	Passenger revenue
January:						
1918	342,384	1,012,176	1,354,560	17,914	1,372,474	$37,362.72
1919	367,746	1,077,189	1,444,935	16,496	1,461,431	39,931.08
1920 (a)	530,502	957,917	1,488,419	18,861	1,507,280	45,683.44
1920 (b)	555,123	998,952	1,554,075	18,861	1,572,936	47,735.19
1921	631,654	825,772	1,457,426	14,626	1,472,052	48,098.14
1922	717,687	486,036	1,203,723	45,541	1,249,264	45,605.07
February:						
1918	296,212	1,001,117	1,297,329	16,179	1,313,508	$34,832.94
1919	348,434	1,009,732	1,358,166	15,964	1,374,130	37,616.34
1920	454,051	333,577	787,628	4,791	792,419	29,374.09
1921	691,042	419,662	1,110,704	10,561	1,121,265	42,945.34
1922	634,266	438,691	1,072,957	43,587	1,116,544	40,487.12

March:						
1918	320,038	1,210,466	1,530,504	20,732	1,551,236	$40,211.22
1919	425,929	1,144,277	1,570,206	16,238	1,586,444	44,181.99
1920	613,756	693,771	1,307,527	13,853	1,321,380	44,563.22
1921	766,507	494,945	1,261,452	14,052	1,275,504	48,224.25
1922	728,230	502,482	1,230,712	62,650	1,293,362	46,461.14
April:						
1918	313,835	1,184,864	1,498,699	18,734	1,517,433	$39,389.03
1919	424,377	1,213,311	1,637,688	15,586	1,653,274	45,485.07
1920	614,958	775,650	1,390,608	17,109	1,407,717	46,260.90
1921	756,014	498,485	1,254,499	15,218	1,269,717	47,770.40
1922	691,649	498,340	1,189,989	44,917	1,234,906	44,549.25
May:						
1918	308,883	1,193,283	1,502,166	21,582	1,523,748	$39,309.81
1919	406,577	1,300,846	1,707,423	15,989	1,723,412	46,345.77
1920	622,678	812,701	1,435,379	24,255	1,459,634	47,387.92
1921	752,468	513,665	1,266,133	15,898	1,282,031	47,896.70
1922	703,150	511,546	1,214,696	51,436	1,266,132	45,388.42
June:						
1918	256,448	1,035,512	1,291,960	22,060	1,314,020	$33,532.64
1919	356,531	1,167,750	1,524,281	16,316	1,540,597	41,181.55
1920	552,845	778,459	1,331,304	23,689	1,354,993	43,211.43
1921	672,347	486,508	1,158,855	17,878	1,176,733	43,347.51
[fol. 659] 1922	637,585	486,320	1,123,905	37,238	1,161,143	41,605.65

EXHIBIT DH

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON.

Third Avenue Railway Company, Third Avenue Line

Passenger Statistics and Revenues for Each Month From January 1, 1920, to September 30, 1922, Inclusive

1920:	Five-cent fares	Three-cent fares	Total revenue passengers	Free transfers collected	Total passengers carried	Passenger revenue
January	2,772,907	140,435	2,913,342	310,585	3,223,927	$142,858.40
February (a)	1,241,959	66,232	1,308,191	115,896	1,424,087	64,084.91
March	2,493,128	124,835	2,617,963	266,886	2,884,849	128,401.15
April	2,817,106	123,991	2,941,097	343,823	3,284,920	144,575.03
May	3,030,878	130,024	3,160,902	368,713	3,529,615	155,444.62
June	3,028,658	115,914	3,144,572	394,676	3,539,248	154,910.32
July	3,041,218	107,739	3,148,957	445,983	3,594,940	155,293.07
August	2,967,502	102,357	3,069,859	416,227	3,486,086	151,445.81
September	3,020,425	121,623	3,142,048	488,450	3,630,498	154,669.94
October	3,179,071	151,397	3,330,468	483,526	3,813,994	163,495.46
November	3,013,291	145,124	3,158,415	441,619	3,600,034	155,018.27
December	3,205,557	147,677	3,353,234	446,358	3,799,592	164,708.16

1921:						
January	3,058,426	156,582	3,215,008	446,675	3,661,683	$157,618.76
February	2,649,636	223,704	2,873,340	439,975	3,313,315	139,192.92
March	3,235,508	266,155	3,501,663	549,123	4,050,786	169,760.05
April	3,255,933	266,461	3,522,394	546,264	4,068,658	170,790.48
May	3,372,905	279,576	3,652,481	587,779	4,240,260	177,032.53
June	3,341,201	271,211	3,612,412	598,642	4,211,054	175,196.38
July	3,304,396	239,046	3,543,442	618,420	4,161,862	172,391.18
August	3,206,073	244,422	3,450,495	611,977	4,062,472	167,636.31
September	3,355,825	257,476	3,613,301	618,733	4,232,034	175,515.53
October	3,425,311	276,120	3,701,431	608,067	4,309,498	179,549.15
November	3,295,819	273,213	3,569,032	574,844	4,143,876	172,987.34
December	3,454,053	290,059	3,744,112	567,675	4,311,787	181,404.42
1922:						
January	3,177,829	277,422	3,455,251	535,730	3,990,981	$167,214.11
February	2,872,036	255,983	3,128,019	483,100	3,611,119	151,281.29
March	3,392,136	295,327	3,687,463	581,932	4,269,395	178,466.61
April	3,387,477	296,631	3,684,108	566,716	4,250,824	178,272.78
May	3,535,995	306,100	3,842,095	615,205	4,457,300	185,982.75
June	3,398,724	296,859	3,695,583	605,335	4,300,918	178,841.97
July	3,254,035	289,661	3,543,696	598,275	4,141,971	171,391.58
August	3,167,203	270,649	3,437,852	610,471	4,048,323	166,479.62
September	3,213,131	304,969	3,518,100	598,092	4,116,192	169,805.62
October	3,308,494	348,797	3,657,291	591,228	4,248,519	175,888.61
November	3,211,651	318,860	3,530,511	556,127	4,086,638	170,148.35

State of New York, Transit Commission, Bureau of Statistics, December 7, 1922.
HSF/EH.

EXHIBIT DI

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON

Receiver New York Railways Company, Lexington Avenue Line

Passenger Statistics and Revenues for Each Month from January 1, 1920, to September 30, 1922, Inclusive

Month	Seven-cent fares (a)	Five-cent fares	Three-cent fares	Total revenue passengers	Two-cent transfers collected	Free transfers collected	Total passengers carried	Passenger revenue
1920:								
January....	201,236	1,685,341	143,550	2,030,127	180,068	81,504	2,291,699	$102,660.07
February (b)	43,389	1,003,528	101,272	1,148,189	37,993	28,414	1,214,596	56,251.79
March.....	126,866	1,671,854	166,480	1,965,200	123,999	71,098	2,160,297	97,467.72
April.....	147,297	1,849,691	176,862	2,173,850	149,266	85,772	2,408,888	108,101.20
May.....	166,636	2,143,053	178,035	2,487,724	156,628	89,191	2,733,543	124,158.22
June.....	186,903	2,353,896	171,921	2,712,720	174,787	84,186	2,971,693	135,935.64
July.....	190,408	2,320,999	160,267	2,671,674	176,874	82,968	2,931,516	134,186.52
August.....	182,908	2,337,030	151,201	2,671,139	144,162	81,442	2,896,743	134,191.09
September..	180,859	2,403,399	171,966	2,756,224	149,301	82,056	2,987,581	137,989.06
October.....	171,398	2,325,008	191,881	2,688,287	149,724	90,924	2,928,935	134,004.69
November...	149,327	2,078,892	192,184	2,420,403	123,544	82,696	2,626,643	120,163.01
December...	152,660	2,154,892	191,791	2,499,343	128,182	81,508	2,709,033	124,184.53

1921:								
January....	141,971	2,099,009	183,470	2,424,450	133,167	81,343	2,638,960	$120,392.52
February (c)	118,929	1,881,326	.....	2,000,255	108,065	53,939	2,162,259	102,391.33
March.....	138,932	2,173,152	.....	2,312,084	134,294	64,503	2,510,881	118,382.84
April.....	137,750	2,255,877	.....	2,393,627	130,951	71,585	2,596,163	122,436.35
May.....	145,154	2,417,535	.....	2,562,689	131,522	77,985	2,772,196	131,037.53
June.....	160,516	2,567,000	.....	2,727,516	137,914	74,432	2,939,862	139,586.12
July.....	168,737	2,494,375	.....	2,663,112	139,698	78,790	2,881,600	136,530.34
August.....	161,743	2,389,192	.....	2,550,935	130,885	72,717	2,754,537	130,781.61
September..	162,837	2,592,905	.....	2,755,742	134,675	78,788	2,969,205	141,043.84
October.....	152,036	2,451,925	.....	2,603,961	137,965	76,649	2,818,575	133,238.77
November...	134,109	2,180,603	.....	2,314,712	126,562	74,347	2,515,621	118,417.78
December...	135,716	2,221,577	.....	2,357,293	126,482	66,364	2,550,139	120,578.97
1922:								
January....	117,538	2,040,926	.....	2,158,464	122,128	66,666	2,347,258	$110,273.96
February...	102,868	1,812,443	.....	1,915,311	106,632	57,649	2,079,592	97,822.91
March.....	126,387	2,167,276	.....	2,293,663	127,132	66,754	2,487,549	117,210.89
April.....	125,383	2,236,763	.....	2,362,146	122,173	66,350	2,550,669	120,614.96
May.....	142,661	2,601,212	.....	2,743,873	126,512	73,912	2,944,297	140,046.87
June.....	148,839	2,549,490	.....	2,698,329	132,514	71,845	2,902,688	137,893.23
July.....	150,644	2,385,644	.....	2,536,288	131,165	74,754	2,742,207	129,827.28
August.....	153,808	2,407,728	.....	2,561,536	135,132	69,636	2,766,304	131,152.96
September..	148,846	2,490,447	.....	2,639,293	136,793	72,765	2,848,851	134,941.57
October.....	143,193	2,526,528	.....	2,669,721	146,082	75,824	2,891,627	136,349.91
November...	122,705	2,281,599	.....	2,422,174	140,575	67,658	2,630,407	116,534.05

State of New York—Transit Commission, Bureau of Statistics, December, 1922.

HSF/M.

(a) Five cent passengers purchasing two cent transfers are classified as seven cent passengers.

(a) On account of severe snow storms during February, 1920, the tracks and conduits were filled with snow, hail and ice, making normal operations difficult or impossible for several weeks.

(c) Transfer agreement with Belt Line Railway Corporation was terminated as of February 1, 1921.

EXHIBIT DJ

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON

Receiver Second Avenue Railroad Company in the City of New York, Second Avenue Line

Passenger Statistics and Revenues for Each Month from January 1, 1920, to November 30, 1922, Inclusive

	Five-cent fares	Three-cent fares	Total revenue passengers	Free transfers collected	Total passengers carried	Passenger revenue
1920:						
January	696,509	67,734	764,243	19,452	783,695	$36,857.47
February (a)	141,724	14,588	156,312	2,326	158,638	7,523.84
March	416,794	38,279	455,073	9,445	464,518	21,988.08
April	682,767	62,271	745,038	18,125	763,163	36,006.48
May	859,602	61,432	921,034	23,873	944,907	44,823.06
June	907,255	62,807	970,062	25,820	995,882	47,246.96
July	945,729	56,371	1,002,100	28,017	1,030,117	48,977.58
August	941,559	49,706	991,265	26,583	1,017,848	48,569.13
September	872,969	58,270	931,239	24,812	956,051	45,396.55
October	858,562	68,927	927,489	24,538	952,027	44,995.91
November	679,939	55,971	735,910	17,528	753,438	35,676.08
December	683,756	51,480	735,236	18,099	753,335	35,732.20
1921:						
January	653,268	51,241	704,509	18,590	723,099	$34,200.63
February (b)	570,797	588	571,385	15,088	586,473	28,557.49

March	699,739	.....	699,739	20,609	720,348	34,986.95
April	703,215	.....	703,215	22,378	725,593	35,160.75
May	749,276	.....	749,276	24,937	774,213	37,463.80
June	873,639	.....	873,639	28,608	902,247	43,681.95
July	920,862	.....	920,862	30,003	950,865	46,043.10
August	876,468	.....	876,468	28,316	904,784	43,823.40
September	879,908	.....	879,908	27,371	907,279	43,995.40
October	812,521	.....	812,521	22,650	835,171	40,626.05
November	713,653	.....	713,653	17,012	730,665	35,682.65
December	722,396	.....	722,396	16,682	739,078	36,119.80
1922:						
January	688,726	.....	688,726	15,808	704,534	$34,436.30
February	650,788	.....	650,788	14,079	664,867	32,539.40
March	790,493	.....	790,493	18,280	808,773	39,524.65
April	807,295	.....	807,295	19,841	827,136	40,364.75
May	924,537	.....	924,537	23,233	947,770	46,226.85
June	909,970	.....	909,970	22,663	932,633	45,498.50
July	902,288	.....	902,288	22,859	925,147	45,114.40
August	866,921	.....	866,921	22,884	889,805	43,346.05
September	871,225	.....	871,225	21,822	893,047	43,561.25
October	859,530	.....	859,530	19,830	879,360	42,976.50
November	814,286	.....	814,286	17,896	832,182	40,714.30

State of New York Transit Commission, Bureau of Statistics, December 7, 1922.

HSF/DR

(a) On account of severe snow storms during February, 1920, the tracks and conduits were filled with snow, hail and ice, making normal operations difficult or impossible for several weeks.

(b) Transfer agreement with Belt Line Railway Corporation was terminated as of February 1, 1921.

[fol. 663]

EXHIBIT DK

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON

The Forty Second Street, Manhattanville & St. Nicholas Ave. Railway Company—Broadway Branch
Passenger Statistics and Revenues for Each Month from January 1, 1919 to Date

1919:	Five-cent fares	Three-cent fares	Total revenue passengers	Free transfers collected	Total passengers carried	Passenger revenue
January	1,232,591	105,219	1,337,810	133,406	1,471,216	$64,786.12
February	1,208,654	94,431	1,303,085	114,632	1,417,717	63,265.63
March	1,392,529	106,767	1,499,296	132,502	1,631,798	72,829.46
April	1,431,900	120,960	1,552,860	122,262	1,675,122	75,223.80
May	1,502,671	130,267	1,632,938	131,728	1,764,666	79,041.56
June	1,462,904	122,243	1,585,147	140,905	1,726,052	76,812.49
July	1,406,747	114,262	1,521,009	138,078	1,659,087	73,765.21
August	1,440,081	105,762	1,545,843	129,125	1,674,968	75,176.91
September	1,525,023	123,263	1,648,286	129,799	1,778,085	79,949.04
October	1,758,419	174,154	1,932,573	139,365	2,071,938	93,145.57
November	1,585,273	177,409	1,762,682	116,316	1,878,998	84,585.92
December	1,545,841	188,510	1,734,351	115,645	1,849,996	82,947.35

1920:						
January	1,477,908	172,852	1,650,760	103,970	1,754,730	$79,080.96
February (a)	580,935	60,257	641,192	41,448	682,640	30,854.46
March	1,453,194	161,095	1,614,289	96,609	1,710,898	77,492.55
April	1,499,642	179,313	1,678,955	99,532	1,778,487	80,361.49
May	1,604,819	188,847	1,793,666	116,484	1,910,150	85,906.36
June	1,574,334	177,401	1,751,735	120,790	1,872,525	84,038.73
July	1,525,252	145,598	1,670,850	125,990	1,796,840	80,630.54
August	1,534,844	138,370	1,673,214	119,045	1,792,259	80,893.30
September	1,625,160	158,307	1,783,467	181,379	1,964,846	86,007.21
October	1,684,535	181,302	1,865,837	221,839	2,087,676	89,665.81
November	1,557,731	165,074	1,722,805	207,969	1,930,774	82,838.77
December	1,568,969	165,443	1,734,412	214,163	1,948,575	83,411.74

(a) On account of severe snow storms during February, 1920, the tracks and conduits were filled with snow and ice, making normal operations difficult or impossible for several weeks.

EXHIBIT DK (Continued)

Case No. 1364

BELT LINE RAILWAY CORPORATION

v.

NEWTON

The Forty Second Street, Manhattanville & St. Nicholas Ave. Railway Company—Broadway Branch

Passenger Statistics and Revenues for Each Month from January 1, 1919 to Date

Month	Five-cent fares	Three-cent fares	Total revenue passengers	Free transfers collected	Total passengers carried	Passenger revenue
1921:						
January	1,688,599	174,779	1,863,378	215,025	2,078,403	$89,673.32
February	1,509,591	195,958	1,705,549	197,175	1,902,724	81,358.29
March	1,797,378	228,790	2,026,168	238,629	2,264,797	96,732.60
April	1,759,927	234,024	1,993,951	242,109	2,236,060	95,017.07
May	1,838,795	234,089	2,072,884	246,881	2,319,765	98,962.42
June	1,864,285	215,297	2,079,582	245,973	2,325,555	99,673.16
July	1,848,662	183,509	2,032,171	238,952	2,271,123	97,938.37
August	1,755,809	179,645	1,935,454	234,300	2,169,754	93,179.80
September	1,887,970	183,283	2,071,253	247,468	2,318,721	99,896.99
October	1,883,797	224,491	2,108,288	267,876	2,376,164	100,924.58
November	1,770,816	214,087	1,984,903	250,118	2,235,021	94,963.41
December	1,790,044	231,336	2,021,380	254,422	2,275,802	96,442.28

1922:						
January	1,794,037	208,614	2,002,651	246,261	2,248,912	$95,960.27
February	1,667,025	182,708	1,849,733	224,210	2,073,943	88,832.49
March	1,939,372	207,155	2,146,527	264,020	2,410,547	103,183.25
April	1,920,321	201,709	2,122,030	261,532	2,383,562	102,067.32
May	2,017,631	205,446	2,223,077	268,629	2,491,706	107,044.93
June	1,978,204	189,461	2,167,665	259,434	2,427,099	104,594.03
July	1,851,052	183,404	2,034,456	247,075	2,281,531	98,054.72
August	1,898,320	181,415	2,079,735	251,757	2,331,492	100,358.45
September	2,002,399	196,825	2,199,224	256,118	2,455,342	106,024.70
October	2,095,174	229,822	2,324,996	272,202	2,597,198	111,653.36
November	1,897,031	224,720	2,121,751	258,804	2,380,555	101,593.15

State of New York, Transit Commission, Bureau of Statistics, December, 1922.
SHF/DR

[fol. 665]

Exhibit DL

Case No. 1364

Belt Line Railway Corporation

v.

Newton

The Forty-second Street, Manhattanville & St. Nicholas Ave. Railway Company, Tenth Avenue Line (a)

Passenger Statistics and Revenue for Each Month from January 1, 1919, Through November, 1922

	Five-cent fares	Free transfers collected	Total passengers carried	Passenger revenue
1919:				
January	337,323	49,296	386,619	$16,866.15
February	322,580	45,005	367,585	16,129.00
March	367,415	52,218	419,633	18,370.75
April	381,713	55,528	437,241	19,085.65
May	416,998	60,083	477,081	20,849.90
June	436,998	63,469	500,467	21,849.90
July	435,894	62,958	498,852	21,794.70
August	434,666	59,196	493,862	21,733.30
Septmber	440,878	60,256	501,134	22,043.90
October	461,350	60,328	521,678	23,067.50
November	435,097	53,434	488,531	21,754.85
December	435,025	51,107	486,132	21,751.25
1920:				
January	414,034	50,418	464,452	$20,701.70
February (b)	115,003	11,645	126,648	5,750.15
March	404,502	43,302	447,804	20,225.10
April	425,751	44,146	469,897	21,287.55
May	484,892	62,607	547,499	24,244.60
June	485,834	67,700	553,534	24,291.70
July	495,838	72,676	568,514	24,791.90
August	488,418	69,988	558,406	24,420.90
September	497,201	69,143	566,344	24,860.05
October	509,997	67,213	577,210	25,499.85
November	456,385	57,013	513,398	22,819.25
December	455,010	59,398	514,408	22,750.50

(a) Route of Tenth Avenue Line: West 130th Street Ferry, East to Broadway, South to 71st Street and 10th Avenue, on 10th Avenue to 42nd Street, West to 42nd Street and North River.

(b) On account of severe snow storms during February, 1920, the tracks and conduits were filled with snow and ice, making normal operations difficult or impossible for several weeks.

[fol. 666] EXHIBIT DL—Continued

Month	Five-cent fares	Free transfers collected	Total passengers carried	Passenger revenue
1921:				
January	439,055	56,967	496,002	$21,952.75
February	380,997	48,810	429,807	19,049.85
March	475,171	62,299	537,470	23,758.55
April	480,356	63,816	544,172	24,017.80
May	504,820	65,952	570,772	25,241.00
June	519,762	66,196	585,958	25,988.10
July	518,292	66,870	585,162	25,914.60
August	497,376	67,671	565,047	24,868.80
September	516,100	68,711	584,811	25,805.00
October	516,908	67,868	584,776	25,845.40
November	485,261	63,503	548,764	24,263.05
December	486,851	62,960	549,811	24,342.55
1922:				
January	466,574	57,292	523,866	$23,328.70
February	425,004	53,082	478,086	21,250.20
March	501,873	64,951	566,824	25,093.65
April	501,965	62,518	564,483	25,098.25
May	543,737	69,805	613,542	27,186.85
June	520,058	67,874	587,932	26,002.90
July	506,481	66,799	573,280	25,324.05
August	494,367	67,263	561,630	24,718.35
September	501,243	65,634	566,877	25,062.15
October	521,192	66,877	588,069	26,059.60
November	476,509	60,050	536,559	23,825.45

State of New York, Transit Commission, Bureau of Statistics, December, 1922.

(a) Route of Tenth Avenue Line: West 130th Street Ferry, East to Broadway, South to 71st Street and 10th Avenue, on 10th Avenue to 42nd Street, west to 42nd Street and North River.

(b) On account of severe snow storms during February, 1920, the tracks and conduits were filled with snow and ice, making normal operations difficult or ompossible for several weeks.

[fol. 667] EXHIBITS DM TO DM-5

(Here follow said exhibits, marked side folio pages 668, 668a, 668b, 668c, and 668d.)

[fol. 669] IN UNITED STATES DISTRICT COURT

Order Approving Statement of Evidence

After hearing counsel for both sides, the foregoing is hereby approved as a true, complete and properly prepared statement of the evidence in this cause.

Dated New York, May 12, 1924.

Jno. C. Knox, U. S. District Judge.

[fol. 670] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION V. TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the United States District Court for the Southern District of New York in the above entitled cause, being as follows:

1. Bill of Complaint
2. Answer of defendant Public Service Commission
3. Answer of defendant Edward Swann, Dist. Att'y
4. Order to show cause, application and affidavits on motion for interlocutory injunction
5. Affidavit of Bernard G. Steinetz, verified January 11, 1921
6. Per Curiam opinion of the Statutory Court, dated January 25, 1921
7. Order granting injunction
8. Affidavit and notice of motion to substitute Transit Commission, State of New York as defendant in place of Public Service Commission, etc., and to amend the answer of the Public Service Commission
9. Notice of motion to dismiss bill of complaint
10. Opinion of Judge Hough, dated June 28, 1922

[fol. 671] 11. Consent and order substituting Transit Commission State of New York as defendant in place of Public Service Commission and denying motion to dismiss bill of complaint and amending answer of Public Service Commission, etc.

BLUEPRINT
TOO
LARGE
FOR
FILMING

12. Statement of the Evidence approved pursuant to Rule LXXV
13. Report of the Special Master
14. Exceptions to report of Special Master filed by defendant Transit Commission State of New York
15. Exceptions to report of Special Master filed by defendant District Attorney
16. Opinion of Judge Knox
17. Final Decree
18. Consent and order substituting Joab H. Banton, as District Attorney, County of New York, as defendant in place and stead of Edward Swann, as District Attorney
19. Assignment of Errors
20. Petition and Allowance of Appeal
21. Citation

Dated New York, June 6th, 1924.

Alfred T. Davison, Solicitor for Appellee. Howard Thayer Kingsbury, Solicitor for Appellant Transit Commission, State of New York. George P. Nicholson, Solicitor for Appellant Joab H. Banton, as District Attorney.

[fol. 672] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter agreed on by the parties thereto.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 18th day of June, in the year of our Lord, One thousand Nine Hundred and Twenty-four and of the Independence of the said United States the One Hundred and Forty-eighth.

Alex. Gilchrist, Jr., Clerk. (Seal of the District Court of the United States, Southern District of N. Y.)

Endorsed on cover: File No. 30,430. S. New York D. C. U. S. Term No. 465. Joab H. Banton, as District Attorney of the County of New York, State of New York, and Transit Commission, State of New York, appellants, vs. Belt Line Railway Corporation. Filed June 20th, 1924. File No. 30,430.

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SUPREME COURT OF THE UNITED STATES

October Term,

No. 465.

Joab H. Banton, as District Attorney of the County of New York, State of New York, and Transit Commission, State of New York,

Appellants,

against

Belt Line Railway Corporation.

BRIEF FOR APPELLANT, JOAB H. BANTON, AS DISTRICT ATTORNEY.

Statement of the Case

In order to avoid duplication by the appellants and to present the facts and arguments to this court in as brief a compass as possible, the subject matter has been divided between the appellants. In the main, this brief deals with the matter of valuation.

The statement and specification of errors set forth in the brief of the appellant Commission is adopted for the purpose of this brief. There need only be added here a statement as to the matter of valuation.

The appellant commission properly maintains that the transfer order was not confiscatory because the additional expense which would be im-

posed by a resumption of transfers would not exceed the additional revenue which would be derived from the transfer passengers attracted thereby (Commission Brief, p. 17).

If this Court should find that the revenue received from the incidental transfer service is in excess of the additional expenses involved, there is no need to consider the valuation of all of appellee's property and revenues and expenses relating thereto. If, however, this Court should find that the incidental transfer service is conducted at a loss, then the matter of the valuation of all of appellee's property and the revenue and expense relating thereto become of importance.

The appellee, it should be here noted, has insisted throughout, the test is not the showing of the transfer traffic, but that the test is the showing of the entire operation of the appellee, including the transfer traffic.

This appellant is in accord with the appellant Commission that if the revenue received from operation of the incidental service exceeds the expense there is no confiscation; likewise there may be no confiscation in the event of some pecuniary loss. There certainly is no confiscation if the entire operation is profitable. [Commission Brief, Point II especially, pp. 19-22].

After a series of adjustments, all relating to expenses and revenues connected with the transfer traffic, many of them speculative and conjectural, the Court below found that there was only a loss of $4,000 per annum on said traffic [R. p. 119].

There were two valuations offered by appellee. The first valuation attempted was that of the witness Madden. Madden had made a valuation in connection with the Bureau of Valuations of the appellant Commission for the purpose of ac-

quiring all of the surface, elevated and railway properties of the City, pursuant to Chapter 134 of the Laws of 1921 as amended by Chapter 355 Laws 1921 [R. p. 155]. Madden testified only as to the valuations of the appellee's property upon the reproduction cost new basis as of June 30, 1921, but was unable to segregate from all of that property of the appellee, that portion which was used and useful for the 59th Street line, which is the line involved in the order of October 29, 1912 [R. pp. 15-26]. Likewise, he was unable to make a similar segregation in this computation on other bases [R. pp. 194, 197, 199, 202, 218].

Objection was made on the ground that it did not appear that the valuation was placed on the property which the plaintiff owned [R. p. 157]. Mr. Madden's figures were the estimated cost to reproduce as stated, without depreciation [R. pp. 157, 160]. Madden gave his estimate of "the cost of bringing this property into first class operating condition" [R. p. 157].

Appellee never introduced estimates as to original cost or as to cost to reproduce at pre-war prices, although these were available [R. pp. 159, 160]. Appellee's counsel stated that these elements were not relevant or competent [R. p. 158]. These estimates are printed as part of the record [R. p. 374, fol. 578]. They were both considerably lower than the cost to reproduce new as of June 30, 1921.

The study made by the Bureau of Valuations, testified to by Madden, is contained in a bulky volume marked Exhibit BS, the pertinent portions of which are included in the record. The scope of the study and method pursued in arriving at the determinations are shown in the record [R. pp. 359-374]. Appellee has maintained

throughout that Exhibit BS is not in evidence and that therefore no figures were in evidence other than reproduction cost figures by Madden, as of June 30, 1921, and by appellee's employees, on part of the property, as of Jan., 1923. To this appellant, it does not seem to be of consequence whether the original cost figure and the 1910-1914 figure, set forth in Exhibit BS, but not testified to by Madden, is or is not in evidence, *in view of the fact that in neither case was there any weight or consideration given to either the original cost or the 1910-1914 figure.*

The attention of this Court is respectfully directed to what occurred when Exhibit BS was received.

The record shows the following [R. p. 191]:

> THE MASTER: "Had not that appraisal, better be marked for identification? (Discussion.)
>
> I suppose nobody disputes the fact that the book before us is an accurate replica or duplicate or whatever you might call the report to the Commission that has been spoken of. It does not make a particle of difference to my mind which party puts in an essential exhibit.
>
> This report made to the Commission, dated Feb. 15, 1922, is marked in evidence Exhibit BS.
>
> You can put as memoranda, in here so there will be no future difficulty that this is done at the suggestion and in fact at the insistence of the Special Master as convenient for himself when coming to read the testimony after the close of the case and is not considered as being put in by either side.
>
> This entire volume is coming to me before I decide the case.
>
> On the argument on my report, if it is desirable for any judge to see it, he will ask for it and if it need be presented, by agree-

ment of the parties, certain pages will be inserted in the record.

Mr. Fertig: Will your Honor permit me to state what, after careful thought, we have considered to be the wishes of counsel and so that I may not put mysef in a position that will jeopardize any of my rights? If your Honor will permit me to say to this witness: "Will you read into the record the various figures for the respective classes of property upon the basis of original cost that you used in reaching the figures that you put into the record," and then have the pages read into the record as his answer.

The Master: I should prefer the witness make his own answer to the question at the proper time.

Mr. Fertig: Your Honor, he would undoubtedly answer that these were the figures. There is no question about that.

The Master: I cannot see the slightest improvement of your suggestion over the one I have made, which seems to me to be entirely simple and with the statement which I have made on the record, certainly you are not prejudiced before any court as having put this in the record, and therefore bound by everything in it, which of course, you would not be in the Federal Court anyhow, I do not know what might happen to you in some State Court.

Mr. Fertig: I will note my exception, and we will go on.

The Master: Yes.

While Exhibit BS included in this record contained valuations upon other bases, to wit: original cost, and reproduction cost 1910-1914, the appellee did not offer, the witness Madden did not testify to and the Master did not consider or give any weight to (as will be more specifically shown later), any element other than reproduc-

tion cost as of June 30, 1921, which Madden testified was $2,859,754 [R. p. 157]. The said reproduction cost new as of June 30, 1921, was adopted by the Master as the valuation of appellee's property devoted to the transfer traffic, only deducting (in addition to a sum of $77,000, representing errors in inventory), a sum characterized as depreciation, but representing only the amount of money required to place in first-class operating condition.

Figures on the original cost and 1910-1914 bases above described as well as that testified to by Madden upon the June 30, 1921, basis, include property not used in rendering the transfer traffic service.

The figures on original cost and 1910-1914 bases, as shown in Exhibit BS, are as follows:

Original Cost Basis.

Original Cost	$1,831,559	(R. p. 374, fol. 587)
*Depreciation, straight line basis	377,090	(R. p. 374, fol. 587)
Cost to place in first class condition	128,246	(R. p. 157)

Reproduction Cost 1910-1914.

Reproduction cost	$2,273,000	(R. p. 374, fol. 587)
*Depreciation, straight line basis	502,950	(R. p. 374, fol. 587)
Cost to place in first class condition	128,246	(R. p. 157)
Reproduction cost less depreciation	1,770,130	(R. p. 374, fol. 587)

It should be here noted that Madden testified that, in his opinion, the proper figure for valuation was that of original cost less the cost to place in first-class operating condition [R. p. 160]; that the Master took as the valuation of all appellee's property the reproduction cost as of June 30, 1921, as computed by Madden [R.

* These figures do not directly appear. They are, in each case, the difference between the estimates marked "Before depreciation" and "Less depreciation."

p. 163], and deducted a sum characterized as depreciation but which, in fact, was only the cost of making repairs.

While the Master deducted only the amount required to put into good operating condition, his questions evidenced a recognition of the distinction between the cost of making repairs and the accrued depreciation computed on the straight line basis, as shown by the following [R. p. 157]:

> By the Master: Q. 51. That is, in first class operating condition as a piece of property as old as it then was? A. That is correct.
>
> Q. 52. Instead of as a brand new piece of property? A. That is correct.
>
> Q. 53. Of course, it would be in first class working condition and still, after several years of wear, it would not be worth as much as it was when it was laid down first? That is, it would not have as long a life even though it were in first class condition, would it? A. Its life would be naturally affected.

A second valuation of appellee's property was attempted through the employees of the appellee upon the reproduction basis as of the time of the hearing before the Master, namely, about January, 1923 [R. p. 220]. This valuation, however, was not complete, covering only track and structures, but not including the car barn (land and building). The employees total figure for track and structure was $1,333,108, being the total of Ryder's figure $1,124,000 and Quinn's figure, $209,108 [R. p. 107]. The employees computed depreciation at $271,000, being computed upon a combination of the observed and straight line bases [R. p. 230]. To the track and structure

figure, was added $280,000 for overheads [R. p. 230], which the Master said "might be perhaps somewhat reduced" [R. p. 107], making a net valuation of $1,342,000 [R. p. 230] as of January, 1923 [R. p. 220].

While the Master discusses in his report the valuation figure given by the company's employees [R. p. 107], he relies in his computation of valuation only on the reproduction figures testified to by Madden [R. p. 109].

Ryder, appellee's employee, estimated the cost to reproduce the track and structures on 59th Street from First to Tenth Avenues, and south on Tenth Avenue to 54th Street [R. p. 222] and estimated the depreciation [R. p. 222]. Appellants objected that he was not sufficiently qualified to give an opinion [R. pp. 221, 222]. It appeared that his unit of prices were based on arbitrary assumptions [R. pp. 224-225], and his percentages for overheads on information from hearings, conversation and reading [R. p. 230]. Quinn, another of appellee's employees, estimated the cost to reproduce certain ducts and cables, and testified that there was no sensible depreciation on these [R. p. 226]. Quinn's inventory included many feet of duct and cable not used by plaintiff but actually used by other companies [R. pp. 254-255]. Neither one of these witnesses gave the actual cost of the property covered by them.

Neither the District Court nor the Master made any finding as to the "fair value" of the property. The Master took the cost to reproduce new [R. pp. 108-109] without any deduction for actual depreciation. The District Court merely adopted the Master's valuation [R. p. 119].

Aside from the testimony as to value already referred to, the only other evidence of value consisted of the price for which the property sold on foreclosure in 1912 [R. p. 105] and the amount of capitalization authorized in 1913 [R. pp. 105, 132-133], at times when the plaintiff owned nearly 19 miles more track than it does today [R. p. 182].

POINT I.

The determination of the court below was that the transfer traffic was confiscatory by reason of a loss amounting to only $4,000 for the fiscal year June 30, 1922; and this upon a series of computations of conjectural character. The burden of proof is upon appellee to prove confiscation beyond a reasonable doubt.

The brief of the appellant Commission considers in detail all of the adjustments in expenses and revenue resulting from the additional service rendered in the transfer traffic.

On the matter of increased revenues, it was estimated by the Court below that the restoration of transfers would hardly exceed upon the Master's calculation, the sum of $42,000 [R. p. 119]. The Master computed the increase in revenues to be $46,000 [R. pp. 101, 104].

As to operating expenses, that might be involved in furnishing this additional transfer service, the Master's estimate was an additional expense of $105,900 [R. p. 104], but the court below rejected this estimate and arrived at the amount of $46,000 [R. p. 119].

There is a wide divergence between the Master and the Court below on both revenues and operating expense. Slight changes in the assumptions, if made by the Court below would have converted the negligible loss of $4,000 to a profit.

This Court, in the cases involving fair return, has never set aside a rate as confiscatory where there was such a narrow margin based not upon undisputed evidence but upon hypothesis and conjecture. Even though this court should hold that all of the assumptions in computing operating expenses are warranted, it is submitted that the loss as found by the Court below is so negligible compared to the total traffic involved as not to justify a decree of confiscation.

A statute or any order made by a State authority pursuant to a State statute is presumed to be constitutional. The burden of proof is upon the appellee to prove the contrary beyond a reasonable doubt. This is so well settled as to require no discussion.

Wilcox v. *Consolidated Gas Co.*, 212 U. S. 19, 41;

Detroit United Railway v. *Detroit*, 248 U. S. 442;

City of Knoxville v. *Knoxville Water Co.*, 212 U. S. 8;

Minnesota Rate Cases, 230 U. S. 352, 499;

In re Young, 209 U. S. 123, 165;

Atkinson Ry. Co. v. *U. S.*, 232 U. S. 199, 221;

Lincoln Gas Co. v. *Lincoln*, 223 U. S. 357;

Des Moines Gas Co. v. *Des Moines,* 238 U. S. 153, 163;

Railroad Commissioners of Louisiana v. *Cumberland Tel. & Tel. Co.,* 212 U. S. 423;

Shepard v. *Northern Pacific R. R. Co.,* 184 Fed. Rep. 165;

Palatka Water Works Co. v. *Palatka,* 127 Fed. Rep. 161;

Sinking Fund Cases, 99 U. S. 700, 718;

Fletcher v. *Peck,* 6 Cranch (star page) 128;

Montana W. & S. R. Co. v. *Morley,* 194 Fed. Rep. 991.

In *City of Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 8, the statement of the Court is particularly pertinent:

> "Nevertheless the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. *Prentis* v. *Southern Railway Co.,* 211 U. S. 210; *Honolulu Transit Co.* v. *Hawaii,* 211 U. S. 282. There can be at this day no doubt on the one hand, that the courts on constitutional grounds may exercise the power of refusing to enforce legislation, nor on the other hand, that that power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact he invalidating facts must be proved to the satisfaction of the

court. In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though confirmed by the trial court."

POINT II.

Accepting the finding by the Court of a loss of $4,000 on the transfer service, there is a net return on all the operation of appellee of $161,200, which is 6.2% on the valuation found by the Master and not disturbed by the Court.

The Master in his conclusions used the revenues and expenses for the fiscal year ending June 30, 1922, as the basis for his computations (being entirely a non-transfer period [R. p. 100]) and gave the revenue $580,526.97 and operating expense as $415,327.07 leaving a return of $165,199.90 [R. p. 108]. The Court in dealing with the effect of restoring transfers found additional revenue of $42,000 and additional expense of $46,000 [R. p. 119] making a loss of $4,000. Deducting this sum of $4,000 from $165,199.90 [R. p. 108], the return on the entire operation as found by the Master, we have $161,199.90 as net return to apply to the fair value of the property. This is 6.2% on the value of the property $2,600,000 as found by the Master [R. p. 109] and left undisturbed by the Court [R. p. 119].

The Court below recognized that the result reached from the operation of the incidental transfer service is affected by the value of appellees property in calculating a reasonable re-

turn [R. p. 119, fol. 197]. But the Court made no application of the principle it laid down and thus overlooked the fact that in accordance with the principle there was a more than a fair return.

The value as found by the Master, and not disturbed by the Court, was on the basis of reproduction cost new as of June 30, 1921, as testified to by Madden [R. p. 109] and without proper deduction for depreciation. This was improper for the reasons below stated. But even upon this improper valuation there is a fair return.

POINT III.

The valuation found by the Master and accepted by the District Court was improper, because it was based solely on the cost to reproduce, giving no weight or consideration to original cost or any other element of value.

The only element of value which the Master had before him was the reproduction cost new given in the Madden testimony and that made by appellee's employees of only a part of the property. *The Master did not consider or give any weight to original cost or any other element of value.*

The Master discussed a figure that he assumed represented the original cost, but the reference was an erroneous one. He referred to the figure $803,450 [R. p. 106] instead of the figure $1,831,559 [R. opposite p. 374, fol. 587]. The original cost figure referred to by the Master represents *the original investment for the roadway and*

track items only [R. Exhibit BS following p. 376, marked 589] and not the whole property. The discussion of the Master in his report was to the effect that the original cost figure was obviously insufficient [R. p. 106]. Having taken an erroneous figure it was not difficult to show the absurdity of the "original cost" figure.

From this assumed original cost figure of all the appellee's property, to wit, $803,450, he deducted depreciation on the straight line basis as computed by Madden, to wit, $226,515, leaving a net value on the original cost basis of $576,935. He then proceeds to show the absurdity of such a figure, it being only $46,000 in excess of the value of the real estate (land only) of the appellee [R. p. 106]. In passing it should be noted that the Master uses $226,515 which is the estimated accrued depreciation and does not use as depreciation the lesser amount $128,246 to place in good condition.

This is the only reference in the long report of the Master to the original cost figure of existing property. The error of the Master in his reference to the wrong page for the figure was brought to the attention of the Court below without result.

The appellee in his brief below conceded that there is no figure for original cost in the case other than the amount $2,557,091.53, which it calls original cost but which in fact was the capital stock and funded debt [R. p. 105], authorized in 1913, at which time the appellee owned nearly 19 miles more track than it does today [R. p. 182].

See

San Diego Land and Town Co. v. *Jasper*, 189 U. S. 439, 443.

It requires no argument to show that the total of stock and bonds outstanding has no relation to the original cost of the property *now* used and useful. It is obvious from the record that whatever moneys may have been invested in appellee's property, covered by the securities and notes issued in 1913 and 1915 *that much property is no longer in existence*, the tracks of the east and west belt lines of the appellee having since been abandoned [R. p. 106], in addition to other property, as will be more fully discussed under the next point.

Under the well settled law laid down by this Court it was the duty of the appellee to submit proof of valuation on bases other than reproduction cost new. This it studiously refrained from doing [R. p. 158]. If, as appellee maintains, Exhibit BS is not in evidence and that reproduction cost new is the only figure in evidence, then assuredly the Master and the Court below did not have before them the elements required by the decisions. In order to fix a present fair value, it was not the duty of the appellants to assume appellee's burden and offer proof of value on other bases; particularly so when the respective appraisals made included property no longer in service, and also included property not devoted to use of the 59th Street Crosstown Line.

If Exhibit BS under the stipulation by which it was admitted, be in evidence, then notwithstanding the availability for consideration of the value of appellee's property on the original cost basis and the 1910-1914 basis, no such elements were considered or given any weight. The Master deduced his value directly from the reproduction new cost 1921 basis as testified to by Madden [R. p. 109].

We do not desire to be technical as to whether or not Exhibit BS is in evidence. Appellee contends Exhibit BS is not in evidence. This appellant is not unwilling to have it so; but if on the other hand it is considered that Exhibit BS is in evidence (by reason of the stipulation, the reference to an erroneous original cost figure by the Master and the inclusion of pertinent parts of Exhibit BS in the record before this Court), then the finding of the Master on valuation is equally unsound in law. *Whether the requisite elements are not in the record or do appear in the record, but are given no weight or consideration is of no consequence. In either case reproduction cost new was the only element of value considered.*

In fact the figure found by the Master and adopted by the Court below was identical with the reproduction cost new figure testified to by Madden with certain slight modification. The figure testified to by Madden, reproduction cost new 1921, was $2,859,754, the figure found by the Master for value was $2,600,000 [R. p. 109]. The difference for necessary adjustments is stated by the Master as follows [R. pp. 108, 109]:

> "His" (Madden's) "valuation was $2,859,754 less a depreciation of $128,246 giving a net less depreciation of $2,731,508. From that he further deducted $77,000 to cover errors in his inventory which would bring the valuation to $2,653,508. He also deducted the cost of reproduction of .31 of a mile of storage battery tracks. How much that is in dollars and cents nowhere appears, but if we take the valuation in round numbers at $2,600,000 we shall certainly cover it and whatever other small points of criticism there may be."

The Court below adopted the Master's finding on valuation, in these words [R. p. 119]:

> "The Master found the property to be worth, in round figures, the sum of $2,600,000. This finding, I believe, was justified by the evidence and I shall not disturb it."

It is submitted that no weight or consideration was given to any element other than that of reproduction cost new as of June 30, 1921.

> *Missouri ex rel. Southwestern Bell Tel. Co.* v. *P. S. C.*, 262 U. S. 276.
> *Bluefield W. W. and I. Co.* v. *P. S. C.*, 262 U. S. 679.
> *Georgia Railway and Power Co.* v. *Railroad Commission*, 262 U. S. 265.

It should be noted that the witness Madden testified that he was much opposed to the use of any estimate to reproduce the property new unless it contemplated the reconstruction of that property and that he advocated the use of original cost as a proper basis [R. p. 165]. He testified that he recommended to the Commission that the proper basis for the valuation of the properties including that of appellee was to adopt the valuation on the original cost basis, less the amount necessary to put into first class operating condition [R. p. 160]. We ask the indulgence of the Court to several of Madden's observations on his own reproduction cost new figure.

> "As a matter of fact a car twenty or thirty years old is not being reproduced now."
> "I have not advocated and am not advocating the cost of reproduction theory. That

is a mechanical method of figuring reproduction which does not correspond in my mind with any reality, that is to say I would not reproduce that car today [R. p. 190].

"The cost to reproduce method assumes that the railway is completed over night. The cost to reproduce method assumes that the railroad is non-existent during the period which you adopted your price" [R. p. 199].

"I do not believe in the reproduction cost method for, in accepting that principle, you are applying a theory which would not obtain in practice. If you are to reproduce the property you would not reproduce the property as it exists but you would spend the money to the best advantage taking full advantage of all the advance in the art since the date of original construction and in addition, it is a fluctuating value; your values of today may be very different from your values six months from now" [R. p. 201].

Madden's reproduction cost new figure was subject to the infirmity among other things that as to brokerage fees he stated that he got them from what he considered to be leading brokerage houses; that he had no experience whatsoever in the matter of brokerage fees; that the brokers knew full well the purposes for which he was getting his information [R. p. 199]. Further, Madden himself admitted that the figure he gave, should be reduced by 10%, representing the decline between the date of the appraisal, and the date of his testimony before the Master [R. p. 164]. Such a reduction reflected in the Master's finding of reproduction cost new, would be $260,000.

POINT IV.

It was error for the Master to hold and the Court to adopt a valuation that included property not devoted to rendering service involved in the transfer traffic and also property not used or useful in any service rendered by appellee.

Madden's valuation on each of the bases, to wit, the original cost, reproduction cost 1910-1914, and reproduction cost new as of June 30, 1921, was not made with regard to the property of the 59th Street line, that is to say, the property involved in rendering the service with which this case is exclusively concerned [R. pp. 194, 197, 198, 218]; although he testified that he had the data available to make valuations on the 59th Street line exclusively [R. p. 194].

The 59th Street line operates on 59th Street from First to Tenth Avenues and on Tenth Avenue from 59th Street to 54th Street [R. p. 137]. The valuation by Madden of the Belt Line property, as it appears in the testimony and Exhibit BS, included large amounts of property not involved in the operation of the 59th Street line [R. p. 218]. It covered 7.56 miles of track [R. p. 154] while the 59th Street line covered about 3.14 miles of track [R. p. 153]. Madden's valuation also included 26 storage battery cars [R. p. 209] not used on the 59th Street line.

Madden's appraisal also included the electrical and mechanical equipment in the substation in the 54th Street carbarn (used for the charging of storage battery cars) which are neither used

nor useful in the operation of the 59th Street line [R. p. 183]. Madden's valuation also included all the duct lines on 59th Street from Second Avenue to Tenth Avenue and on Tenth Avenue from 59th Street to 54th Street [R. p. 226] which are jointly used by the appellee and other companies, only a portion of which is devoted to the use of the 59th Street line [R. p. 183].

If it were possible from the record to deduct from the reproduction cost figures of June, 1921, as testified to by Madden, the reproduction cost values of the property erroneously included, a correction could be made to ascertain the proper figures; but there is no proof submitted in the record from which such computations could be made although Madden stated he had the data available [R. p. 194]. The Master apparently conscious of this difficulty attempts to overcome it by a deduction of $54,408, saying:

> "We shall certainly cover it and whatever small points of criticism there may be" [R. p. 109].

The "small points" of criticism are the inclusion of 2.62 miles of storage battery track [R. p. 154], the excess quantity of ducts in 59th Street [R. p. 107], as well as the 26 storage battery cars [R. p. 209] and the electrical and mechanical equipment in the unused substation in the 54th Street carbarn [R. p. 183]. All of these are grouped under the characterization of "small points" of criticism for which an allowance of $54,508 was made by the Master despite the fact that there is no evidence in the record supporting such a computation or any other. The sum of $54,508 was arrived at not by any accurate

calculation, as the figure would seem to indicate, but by striking out the sum mentioned from $2,654,508, to arrive at a round figure [R. p. 109].

POINT V.

The valuation found by the Master and accepted by the District Court was improper because based on the cost to reproduce without any deduction for depreciation; such deduction as was characterized as depreciation was only the cost to put the property in first-class operating condition.

Madden's figure for reproduction cost new as of June 30, 1921, was $2,859,754 [R. p. 157]. The cost to place in first-class operating condition he gave as $128,248 [R. p. 157]. On track and structure and rolling stock alone the accrued depreciation on the straight line basis is $634,818 [Ex. BS, Tables 589,590, opposite page 376; p. 372]. Whether the latter figure be consisdered as being in the record or not, the fact is that it represents depreciation on the basis usually figured as testified to by Madden [R. p. 372], and that no such depreciation was deducted.

The Master in taking Madden's reproduction cost new figure deducted Madden's figure for cost to put in good operating condition to wit $128,246, characterizing it as depreciation [R. pp. 109, 158, 160, 161, 201].

The effect of putting the property in first-class operating condition was recognized by the Master himself as not completely representing depreciation [R. p. 157; statement, *supra,* page 7].

There is no need at this date of entering into a discussion of the law as laid down by this court, relating to depreciation.

> *Knoxville* vs. *Knoxville Water Co.*, 212 U. S. 1, 9, 10;
> *Minnesota Rate Cases*, 230 U. S. 352, 457, 458.

If Exhibit BS be held not in evidence, then the record is barren of any fact showing what the accrued depreciation amounts to on the reproduction cost new basis; accordingly, the Master could not make a proper finding as to that element.

SUMMARY

In addition to the points of Appellant Commission, in which we fully concur, and to the able argument of counsel, in which we are in accord, we respectfully submit that:

1. That the determination of confiscation by the Court below was based upon a finding of an insignificant loss, predicated on conjecture and contrary to the rule requiring proof beyond reasonable doubt.

2. That adopting the Court's finding of loss on the incidental transfer service, the figures show a return of 6.2% on the valuation found by the Master and not disturbed by the Court.

3. That the Master took substantially the reproduction cost new as of June 30, 1921, by Madden as the value of appellee's property, and gave no weight or consideration whatsoever to original cost or any other element.

4. That it was error for the Master to hold and the Court to adopt a valuation that included property not devoted to rendering service involved in the transfer traffic as well as property not used or useful in any service rendered by appellee.

5. That even assuming that a reproduction cost new figure was correct, a proper deduction should have been made for depreciation; the cost to put into good operating condition not being depreciation.

CONCLUSION

The decree appealed from should be reversed, the injunction vacated and the cause remanded with instructions to dismiss plaintiff's bill on the merits with costs in both courts.

Dated, January 31, 1925.

Respectfully submitted,
George P. Nicholson,
Corporation Counsel,
Solicitor for Appellant,
Joab H. Banton, as
District Attorney of the
County of New York.

M. Maldwin Fertig,
of Counsel.

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SUPREME COURT OF THE UNITED STATES

October Term,
No. 465.

Joab H. Banton, as District Attorney of the County of New York, State of New York, and Transit Commission, State of New York,
Appellants,
against
Belt Line Railway Corporation.

REPLY BRIEF FOR APPELLANT BANTON.

Statement.

There is no occasion for taking the time of the Court by making a statement. We proceed to reply to the points in answer to appellant Banton's brief.

POINT I.

There is nothing in the record to justify the assertion that the loss as indicated by the computation of the Court below on the transfer traffic was greater than $4,000 for the fiscal year ending June 30, 1922.

(*Replying to Appellee's Point VI*)

I.

The point made is that the Court did not find a loss limited to $4,000 per annum on the trans-

fer traffic but that it made this finding "without reference to a *possible* loss of revenue arising from the fact that *numerous* passengers who now pay 5 cents per ride on the 59th Street line, would, if transfers are restored, pay into the treasury of complainant but two cents per ride" (italics ours). [R. p. 119].

This point involves the question what would have been the results during the fiscal year ending June 30th, 1922, if the transfer order had been in effect? The Court's conclusion was that there would have been a 12½% increase in traffic with an additional gross revenue of $42,000 as against a 10 per cent increase in expenses or a total additional cost of $46,000; or a decrease in net revenue of $4,000 [R. p. 119].

Neither the Master nor the Court below found, nor does the record show what the "possible" loss would be nor how many the "numerous" five-cent passengers would be; nor, does the record anywhere show that there would be any such loss of revenue. Nor does appellee give any reference to the testimony in support of this assertion.

Appellee shows [Brief, p. 76] that in the fiscal year 1922 there was an increase of 499,434 five-cent passengers compared with the preceding fiscal year, 1921. He assumes that all of the additional five-cent passengers would have been transfer riders (yielding 2¢ each to the appellee), had the Commission's transfer order been in effect. It is further assumed 499,434 new five-cent passengers came from the two-cent group of the previous year. In support of this contention, appellee quotes the Master [Brief, p. 77] to the effect that these passengers had

"their accustomed N. or S. route with crossover on 59th Street, and were satisfied to pay the additional five cents rather than take the trouble to find some new route. It is difficult to see where else they could have come from. There is no suggestion of any regional conditions tending to increase travel on the 59th Street line, a ride beginning and ending on that line. General increase of population will not account for it." Appellee does not add the last sentence which reads: "The advance estimates of the current census indicate that while the other boroughs have materially increased in population since the last one, Manhattan has remained substantially unchanged."

Appellee then proceeds to show that a loss of three cents on these five-cent passengers would amount to $14,983.02.

It is submitted that there is nothing in the record to justify the assertion of the Master above quoted. Neither the Master nor appellee bring to the support of these conjectures any reference to the testimony. There is none to be found.

As a mere supposition made *outside of the Record*, there is no reasonable justification. The Master assumes the bulk of the five-cent passengers referred to would rather go through the inconvenience of traveling on the surface lines and paying an additional five-cent fare than find some more direct and less expensive route. The Master finds it difficult to see where these passengers could have come from other than from former transfer passengers, ignoring completely the tremendous growth of business and other activities in the mid-section of Man-

hattan. He states that the general increase in population would not account for it wholly, assuming that the riding on the 59th Street Crosstown line comes exclusively from residents of Manhattan, and completely ignoring the fact of common knowledge that hundreds of thousands daily pour in from the outside Metropolitan district, an addition to the several hundred thousand daily visitors from other parts of the country that flow into and through the territory served by the 59th Street line.

All these things of common knowledge, outside the record, the Master ignored, but did take the pains to examine and compare the past census of population for *Manhattan, as a whole*, in order to show that the additional passengers could not possibly be attributed to increase in the population.

The only reasonable conclusion is that the increase of five-cent passengers in 1922 was due to the normal traffic growth of the 59th Street line. While the total number of 499,434 is large when compared with the total number of the previous year, it amounts to an increase of only six and five-tenths per cent. (6.5%) on the 7,605,441 five-cent passengers of the year before [R. pp. 430-433]. This is only a moderate increase, and conforms entirely with what is to be reasonably expected from the rapid business developments in that particular section.

The record shows (Exhibits DH, DI, DJ, DK and DL) the five-cent passengers for the fiscal years, 1921 and 1922, for the Third Avenue line, the Lexington Avenue line, the Second Avenue line, the Broadway line and the Tenth Avenue line, for which the increase in 1922 over 1921 was respectively as follows:

Five Cent Fares

	Year ended June 30 1922	1921	Increase %
59th Street (Belt Line)	8,100,633	7,605,441	6.5
Third Avenue.....	39,805,674	37,340,673	6.6
Lexington Avenue....	27,738,687	27,014,119	2.7
Second Avenue.....	9,697,617	9,232,448	5.0
Broadway Branch (42d St. M. & St. Nich.)..	22,253,688	19,955,066	11.5
Tenth Avenue (42d St. M. & St. Nich.).....	5,979,999	5,703,010	4.9

[R. pp. 430-433, 434-435, 436-437, 438-439, 440-443, 444-445.]

The lack of increase in population in Manhattan as a whole, according to the census, did not prevent these lines from attaining their substantial increases for 1922, as against 1921.

II.

Appellee makes the point that there was no allowance for depreciation in the computation showing a loss of $4,000 for the fiscal year, 1922, on the transfer traffic (Brief, p. 77). *The appellee did not prove any operating expense for depreciation.*

Plaintiff's Exhibit J, attached to the complaint (R. p. 46) shows depreciation charges for part of the year 1913, and for the years 1914, 1915 and 1916, and shows no depreciation charges subsequently up to and including the year 1920. Exhibit B H, which was a compilation of statements of income from July 1, 1920, to September 30, 1922, to the Commissions, shows a depreciation charge of $47,192.55 for the year ended June

30, 1922, *but none whatsoever for the year ended June 30, 1921* (R. p. 336).

An examination of Exhibits J and B H shows that the Company did not have a regular and systematic method of making a charge for depreciation for each year. Since there is no depreciation charged for five years prior to 1922, the fact is that the charge of $47,192 in 1922 was not properly applicable to that year.

There is not a word of proof in the record supporting this or any other charge for depreciation for the fiscal year ended June 30, 1922, or for other years when charges were made or not made.

We recognize that in a statement of operating expense for the purpose of determining reasonable rates, provision should be made for depreciation, but any such inclusions should be established by competent proof. Likewise, proof should be offered to show that the item of maintenance does not include elements properly taken care of by depreciation, as, for example, the renewals and replacements of property.

It is true that the appellee set up on the books a charge for depreciation in the year 1922, although a similar charge was not made for the previous five years. Exhibit B H (R. p. 336) is in evidence as a statement of the book figures and not in proof of the facts therein contained. Appellee's witness Farrington testified upon its receipt in evidence that

> "to the extent this is actual book figures as here we have included interest earnings and also the depreciation, where it was set up. Otherwise it is the same" (*referring to the three previous exhibits BE, BF and BG*

found at pp. 330, 332, 334, which exhibits did not contain any charge for depreciation) (R. p. 149).

Certainly such a statement by the witness of what the books carry for depreciation for the fiscal year ending June 30, 1922, is no proof of the depreciation for that year.

It is to be noted that Farrington was the acting auditor prior to which he had been assistant auditor. The appellee did not attempt to prove by this witness, because of lack of qualification, the actuality of the depreciation charge. Exhibit BH purported to be a resume of Exhibits BE, BF and BG, none of which included depreciation charges [R. p. 149]. But BH included interest charges and depreciation, as shown on the books. Reference to Q. 107 and Answer [R. p. 149] shows that counsel sought a reply that all of the charges were correct (whether as a statement of what appears on the books or as an actual fact is not clear) but the witness would only vouch for the correctness of the transcription from the books. This is certainly not proof of the estimate of depreciation for the year in question.

III.

Appellee proceeds to show a still further imaginary loss by urging that the 21% increase in transfer traffic would mean a 21% increase in operating expenses, instead of 10%, as computed by the Court (Brief, page 80). That a 21% increase in transfer traffic would mean a 21% increase in operating expenses is stated to be based *on undisputed evidence*. The fact is otherwise.

Appellee's witness Farrington first testified

that he "did not say that the expenses of operation varied substantially with the number of passengers carried. I testified that expenses increased in the same proportion as car mileage" (R. p. 172). The next question elicited the response that "if there is any appreciable number of passengers carried, why no, that is the mileage will be increased," and then replied to the effect that the mileage will be increased practically in precisely the same proporton as the increase in the number of passengers. In other words, the witness himself first testifies that expenses of operation did not vary substantially with the number of passengers carried but increased in the same proportion as car mileage, and immediately thereafter takes refuge behind the statement that the increased car mileage varies with the increased number of passengers.

The testimony of appellee's witness Thompson contradicts that of Farrington (R. p. 144). Thompson testified that with the decrease in the number of passengers there had been no decrease in car mileage.

It may be true that a service taxed to its capacity may require additional car mileage, while an already heavily burdened service reduced in passengers may justify the continuation of the old car mileage, but the testimony by appellant's witness Smith was (R. p. 250) that there was sufficient car mileage during the *non-rush hours* and that a 10% increase in car mileage *could* be used during the *rush hours.*

Appellee (Brief, p. 30) creates the impression that the present service is inadequate and requires an increase of 10% car mileage, wholly ignoring the uncontradicted testimony of Smith

that no additional car mileage was required during the non-rush hours.

Even assuming that there is a direct relation between increased car mileage and increased traffic, it does not follow that increased expenses go along in the same proportion. It is common knowledge that expenses do not vary directly with car mileage. There are costs, for instance, taxes, etc., which are practically constant. *In fact appellee's own witness Thompson so testified* (R. p. 147).

IV.

Summary.

First, there is no substance in the point that there would be an additional loss by reason of a number of existing five-cent passengers becoming transfer passengers (yielding two cents to appellee).

Second, that no allowance was made for depreciation.

Third, that an increase in *passengers* of 21% would mean an increase *expense* of 21%; assuming that a 21% increase in *passengers* would mean a 21% increase in *car mileage*, it does not follow that there would be an increased *expense* of 21%. To the contrary, appellee's own witness testified that *total operating expenses* do not increase in proportion to increase in *passengers*..

POINT II.

There was available for return for the year ending June 30, 1922, the sum of $161,200.

(*In Reply to Appellee's Point VII*)

Appellee here merely computes what would be the additional loss on the transfer traffic, and its effect on the total operations with a view to showing no return available. The computations are based on the three wholly unfounded assumptions dealt with in appellee's Point VI and are treated in the preceding point herein. The assumptions falling, the imaginary figures go with them. At most, the loss for the fiscal year ending June 30th, 1922, on the transfer traffic would have been $4,000, as found by the Court, which deducted from the revenue $165,200 found by the Master gives the return of $161,200.

POINT III.

The valuation of the Belt Line Corporation's property found by the Master and not disturbed by the Court was improper, both as to the corporation's entire property and even more so as to the 59th St. Crosstown Line of appellee.

(*In Answer to Appellee's Brief, Point VIII*)

I.

The point is made (Brief, p. 84) that neither counsel for appellants saw fit to introduce figures

relative to the alleged property of appellee on bases other than the reproduction cost new as of June 30, 1921, although said figures were available to the appellants.

We need not here go to any length in reiterating the point that the burden of proof is upon the appellee. However, Madden's appraisals on the respective bases contained property not used at all by the 59th Street line (not contradicted by appellee), as well as property jointly used by the 59th Street line and other companies (Banton's brief, pp. 19, 20, uncontradicted by appellee, and Madden's testimony, Record, p. 194, fols. 338, 339). Certainly appellees were not required to offer appraisals on original cost on the 1910-14 basis contained in Exhibit B-S based on improper inventory.

Assuming that the inventory on which the respective appraisals were computed were correct, and that two of the bases not offered by appellee were available and might have been offered by the appellants has force, there can be no justification for the argument that they should have been offered by appellants where the inventory underlying them was claimed to be incorrect, and in fact shown to be improper, with relation to the 59th Street line.

II.

The contention that the "original cost" was $2,557,091.53, which was the amount of the securities issued in 1912 and 1915, is unique as a conception of the original cost of the properties now used and useful; there having been an abandonment of 19 miles of track [R. p. 182] *only*

3.159 miles remaining [R. p. 180] *as well as disuse of other property* [Banton Brief, Point IV]. *The East Belt Line was abandoned in 1919; the West Belt Line was abandoned in 1921* (R. p. 106). These facts are not disputed by appellee. The Master found it quite persuasive evidence of the *market value at the time of sale* but the figure of $1,673,000 (R. p. 105), which was the total purchase price at the foreclosure is no indication whatsoever of market value or any other value *of existing property* at the time of the trial.

The price brought at a foreclosure sale and the total amount of securities issued under commission regulation may be some evidence of *the original cost of the original property.* It has no relation whatsoever to the original cost of existing property devoted to the service.

Appellee says [Brief, p. 85] "if original cost were to be discussed as the basis of valuation, it makes no difference that the Belt Line Company has, in order to continue to operate the remainder of its street railroad, abandoned part of its line because *its investment still remains,* and it has not earned enough to amortize or write off the capital loss *caused by the abandonment.*" No authority is cited in its support. The oft-repeated rule allowing a utility a return on the property used and useful, precludes a return on property not used and long since abandoned.

Further, there is not a scintilla of evidence justifying the statement that the company did not earn enough to amortize or write off its capital loss caused by the abandonment on the East and West Belt Lines and other property. The statement so far as the record is concerned is

pure fiction. But even if that were the fact, the failure of the company to amortize the abandoned part of its property which was in service for many years is no justification for continuing to burden the present users with a return on property out of existence. (See Knoxville v. Knoxville, 212 U. S. 1, 14.)

III.

(a) As to reproduction cost new as of June 30, 1921, testified to by Madden, appellee makes the point that Madden's figure (which will be next discussed), did not include any real estate.

The fact is that Madden's figure of $2,859,755 covered all of appellee's property, and the Master in taking Madden's reproduction figure as of June 30, 1921, took it to include land (R. p. 109). The Master says (R. p. 109):

> The Master: "As the record of the testimony stands, it would seem clear that the value of the land ($531,000) should be added to this. The Master, however, is inclined to believe that the witness Madden's reiteration of the statement that the valuation of the land was not included in his valuation means merely that he did not himself go into the question of valuation of real estate, but accepted the figures of Mr. Ruland and that the figures of Ruland's valuation appear in Madden's total of $2,600,000 to which it has been here reduced.
>
> If the mere inclusion of Ruland's figures in this amount of $2,600,000 or their addition to it at all affected the final conclusion on the crucial question before the Master he would re-open the cause and have the obscurity removed. * * *"

The Master with a full knowledge of the testimony, and having heard the witness testify, determined this point and found that the land value was included in Madden's figures.

However, if it should seem that the Record is obscure on this point, then the appellee is certainly not entitled to receive the benefit of an additional $531,000, which was not clearly shown.

The complainant, here the appellee, must prove its case and cannot take to itself the benefit of any doubt or obscurity, and especially so under the rule laid down by this Court and treated in appellant Banton's Brief, Point I, "The invalidating facts must be proved to the satisfaction of the Court beyond a reasonable doubt."

(b) It is to be noted in connection with Madden's reproduction cost figures of June 30, 1921, that the appellee gives it at $2,504,478.60 (Brief, p. 86). This figure results from a deduction of 10% representing the difference between the reproduction figure of Madden at the time he made the appraisal, and the date of trial (Brief, p. 16).

Thus, appellee itself concedes a shrinkage of $278,275 between the two dates. This shrinkage in valuation, however, was completely ignored by the Master in finding the reproduction cost new at the conclusion of the case. The Master takes the figure of $2,859,754 (R. p. 109) instead of the figure conceded by appellee of $2,504,478.60. *On a 6% basis the difference in revenue required annually to give a return on the excess amount would be over $16,750.*

IV.

Appellee argues (Brief, p. 87) that if the appellants were dissatisfied with what it terms "Madden's estimate of depreciation," the appellants were at liberty to introduce evidence thereon, and that the fact that the appellants did not see fit to call any witness upon the subject is significant of the fact that Madden's estimate was entirely proper.

Even if Madden had testified on the subject of what properly constituted depreciation the appellants would have been under no duty to meet it with their own estimate of depreciation. The burden of properly showing depreciation is squarely on the shoulders of the appellee and cannot be shifted. Appellee delights to term a deduction for conditioning the property "deprecation." *Madden testified to no figures for depreciation of appellee's property. His testimony was entirely confined to testimony of the cost of conditioning new to place the property in first class operating condition, which he placed at $128,248.*

As pointed out in Point V of Banton's Brief (p. 21), the accrued depreciation on the straight line basis of track and structure and rolling stock alone as shown in Exhibit B S was $634,818. The depreciation on the part of the property alone was over five times as great as the deduction made by the Master under the characterization of depreciation.

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 465.

JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and Transit Commission, State of New York, Appellants, vs. BELT LINE RAILWAY CORPORATION.	

BRIEF FOR APPELLANT TRANSIT COMMISSION.

Statement of the Case.

The Proceedings.

This is an appeal by the Transit Commission of the State of New York (successor to the Public Service Commission, First District), and the District Attorney of New York County, from a final decree of the District Court of the United States for the Southern District of New York,

made on November 30th, 1923 (R., pp. 120-122). This decree enjoined the enforcement as against the Belt Line Railway Corporation of an order made by the Public Service Commission, First District, on October 29th, 1912, establishing certain through routes, requiring the exchange of transfers for this purpose, and fixing the fare to be charged at five cents (R., pp. 15-26).

The suit was brought by the Belt Line Railway Corporation in December, 1920, against the Public Service Commission, the District Attorney of New York County, and the Attorney General of the State. As the Public Service Commission (now the Transit Commission) represents and exercises the power of the State in the matters involved, the Attorney General never appeared or answered and may be regarded as out of the case.

An injunction *pendente lite* was granted by the "Statutory Court" of three judges, organized under §266 of the Judicial Code, on January 26, 1921 (R., pp. 67-71). While the three months period in which an appeal might have been taken to this Court (Act of Sept. 6, 1916, §6) was running, the Public Service Commission, First District, was superseded by the Transit Commission, which was created by Chapter 134 of the Laws of New York of 1921. This Statute became a law on March 30, 1921 (R., p. 72). The appointment of the Commissioners took effect on April 25th, 1921 (see Transit Commission Reports, N. Y., Vol. I, fly leaf). This change of organization and administration took place just as the time to appeal from the injunction order was expiring.

On June 28, 1922, a motion on the pleadings to dismiss the Bill was denied and the cause was referred to Hon. E. Henry Lacombe, as Special Master, to hear the allegations and proofs of the parties and report the evidence with his findings and conclusions (R., pp. 75, 77). The Report of the Special Master was filed on May 25th, 1923 (R., pp. 79-110). Exceptions to such Report were filed by the present appellants (R., pp. 110, 114) and, after argument thereon, the basic conclusion of the Master, that the order attacked was confiscatory, was confirmed and the final decree now appealed from was made on November 30th, 1923 (R., pp. 118, 120). As will be pointed out hereafter, the Master differed in his conclusions upon both the law and the facts from the Statutory Court, and Judge Knox on final hearing differed from the Master on many important facts, but apparently deemed himself bound to follow the decision of the Statutory Court on certain points as "the law of the case" (R., p. 119).

The Facts.

There is little or no conflict of testimony in this case. The controversy upon the facts arises from the different inferences and conclusions to be drawn from testimony and statistics which are substantially undisputed. It is necessary to state the facts in some detail and further reference to the evidence will also be made in the Argument.

The Belt Line Railway Corporation is the successor to the Central Park, North and East River Railroad Company, which in 1912 operated a street railroad in New York City, across town on 59th Street at the southern end of Central Park

from First to Tenth Avenues, known as the 59th Street Crosstown Line, and up and down town on the East and West sides of Manhattan Island from 59th Street to the Battery, where the East and West Belt Lines, as they were styled, met, making a total mileage of a little over twenty miles.

Owing to the long and narrow configuration of Manhattan Island, with its long main avenues running North and South, and its short cross streets at right angles East and West, and with Central Park separating the East and West sides from 59th to 110th Street, the 59th Street Crosstown Line constituted a central link in the principal through routes between the upper East and lower West side or the upper West and lower East side.

On October 29th, 1912 (R., pp. 14-26), the Public Service Commission, acting under subd. 3 of §49 of the Public Service Commissions Law, made a transfer order establishing a number of through routes and requiring transfers therefor at a single five cent fare. This order required the Central Park, North and East River Railroad Company to exchange transfers at the intersections of its 59th Street Line with the lines operated on First Avenue, Second Avenue, Third Avenue, Lexington Avenue, Madison Avenue, Sixth Avenue, Seventh Avenue, Broadway, Eighth Avenue, Ninth Avenue and Tenth Avenue (R., pp. 15-25). The Central Park, North and East River Railroad Company expressly accepted this order (R., p. 391) and agreed with the other Railroad Companies affected upon a division of the five cent fare, giving two cents to the cross-

town line and three to the up and down-town lines (R., p. 306).

Afterwards, and on November 14, 1912, the property and franchises of the Central Park, North and East River Railroad Company were sold under foreclosure to one Cornell (R., pp. 270-278, 265), who organized the Belt Line Railway Corporation (R., pp. 286-288), the present appellee, hereinafter usually designated the plaintiff, and conveyed to it the property and franchises formerly owned by the predecessor company (R., p. 279).

In 1919 and 1920 the Receiver of the New York Railway Company turned back the leased lines on Eighth, Ninth and Madison Avenues to their owners, who were not parties to the transfer order and were therefore not bound by it. This eliminated a number of the through routes previously afforded. On June 3rd, 1919, with the approval of the Public Service Commission, the East Belt Line, with about ten miles of track, was abandoned (R., pp. 174, 182); and on March 24, 1921, the West Belt Line, with 8.831 miles of track, was in like manner abandoned (R., pp. 174, 182). This left the Belt Line Railway Corporation operating only the 59th Street line from First to Tenth Avenue, and south on Tenth Avenue to 54th Street, a total distance of about two miles (R., pp. 137, 179, 180), and exchanging transfers with the lines of the Third Avenue Railway Company, the Second Avenue Railroad Company and the New York Railways Company.

On May 11, 1920, the Receiver of the New York Railways Company applied to the Public Service Commission, First District, to be relieved of the

requirements of the transfer order (R., pp. 393-399). The Belt Line Railway Corporation later joined in the application and asked for a discontinuance of all transfers except with the lines of the Third Avenue System, of which it was and is a part (R., pp. 348-351). After hearings, the Commission, on July 9, 1920, made an order requiring the continuance of the transfers, but increasing the joint rate from five cents to seven (R., pp. 48, 49). The Belt Line Railway Corporation did not accept this order and on July 23, 1920, applied for a rehearing. The Receiver of the New York Railways Company made a similar application on August 28, 1920 (R., pp. 402, 403). On August 31st, 1920, the Commission ordered a rehearing and suspended the operation of the order of July 9, 1920, pending its determination (R., p. 405). Counsel for the present appellee frankly stated in his brief on the motion for preliminary injunction that he would have challenged the seven cent transfer order, had it remained in force, on the same grounds as the five cent transfer order. In other words, he objects, and has consistently and persistently objected, to any joint rate whatever, and therefore to any effective transfer order.

The taking of testimony on the rehearing was concluded on November 10, 1920 (R., p. 138), but the case was not then finally submitted, for thereafter counsel for the Receiver of the New York Railways Company represented to the Commission that the Stenographer's Minutes of the rehearing were erroneous on a material point, namely, the time of day ("rush hours" or non "rush hours") when the majority of the transfer

passengers were carried, and on December 16, 1920, submitted what appeared to be his final proposed corrections (R., pp. 426, 428, 429). On the same day, and while one of the petitioners was thus holding the rehearing open, the other (the present appellee) hurried into court with a Bill of Complaint verified two days before, alleging that the Commission had refused or failed to decide the rehearing within thirty days after its final submission, pursuant to §22, Public Service Commissions Law (R., pp. 11, 85). Shortly thereafter the preliminary injunction was granted and had the effect of abolishing all transfers between the line of the plaintiff and the lines of the New York Railways Company and of the Second Avenue Railway Company. There has thus been a substantial period of operation without the transfers objected to, so that the Court below had on final hearing, and this Court now has, an opportunity to compare actual results instead of merely conjecturing the probable result of giving the plaintiff the relief it sought.

The preliminary injunction was granted upon *ex parte* affidavits, which the Court regarded as sufficient to show for the purposes of the motion that the Belt Line Railway Corporation, upon its whole operations, was not earning a sufficient amount to pay actual operating expenses, and was carrying a majority of its passengers upon transfers for two cents each, which the Court regarded as less than the actual cost of their carriage. Many of the so-called "findings" made by the Statutory Court were shown by the evidence before the Master to be erroneous.

The theory upon which the Statutory Court proceeded, and which the plaintiff has continued

to urge, is that the cost of carrying the transfer passengers should be determined by dividing the total expenses of operation, plus interest paid on indebtedness, by the total number of all passengers carried, and that, if the rate received for carrying any passenger is less than the cost as so determined, such rate is confiscatory.

The Master rejected this contention, and held that the proper test was that urged by the Commission, namely, whether the additional cost of carrying transfer passengers so exceeds the revenue derived therefrom as to constitute confiscation. As the Master put it, after premising that aside from the required transfers the results of the Company's operations must on the Record be regarded as satisfactory to it (Rec., p. 97):

> "The actual question presented is whether the rendition of the additional service now required by the revised order of October, 1912, temporarily suspended by the injunction, will so substantially reduce the income, or increase the outgo as to change the present satisfactory condition to an unsatisfactory one."

He also said (R., p. 97):

> "The sole question is: will this additional service (additional to the double service it already renders,—to its own passengers and to the Third Ave. transfers) cost so much more to perform than the revenue obtained from it will produce, as to be confiscatory?"

In applying this test, however, the Master reached erroneous conclusions as to the facts, some of the most important of which were recog-

nized and pointed out by Judge Knox in the District Court (R., p. 118).

The Master compared the results of operation for a one year period after transfers were discontinued by the injunction with those for a corresponding period prior to the injunction (R., pp. 92-104) and found that since the injunction the number of passengers had been reduced by about 2,000,000 (R., pp. 95, 102) passenger revenue by over $46,000 and operating expenses by $105,900 (R., p. 104). He attributed all this decrease in operating expenses to the discontinuance of the transfers (R., pp. 102-104). In this he was clearly in error, as indicated by Judge Knox (R., p. 118). He considered that if transfers were restored, the lost passengers would return (R., p. 96) the revenue would increase by over $46,000, and the expense by $105,900 (R., p. 104). Adding these estimated increases to the actual figures for the year ended June 30, 1922, he found that if transfers were restored the result would be as follows:

	Actual figures with transfers abolished	Estimated Increase	Estimated figures—transfers restored
Revenue	$580,526.97	$46,326.72	$626,853.69
Expenses	415,327.07	105,900.00	521,227.07
Net	$165,199.90 (R. p. 108)		$105,626.62 (R. p. 109)

Taking certain estimates of the cost to reproduce the property at 1921 prices, less "the cost to place the property in first class operating condition" (R., pp. 157, 158), which he erroneously called "depreciation" (R., pp. 106, 109), he found the value of the property to be $2,600,000 (R., p. 109). The actual net income of $165,199.90

would give a return of over 6% on this valuation (R., p. 108), but the estimated net income of $105,626.62 would give a return of 6% only upon the smaller sum of $1,760,443 (R., p. 109). He, therefore, concluded that so much of the order of October 29, 1912, as requires plaintiff to exchange transfers for a single five cent fare with the lines of the Second Avenue Railroad and of the New York Railways, is confiscatory (R., p. 109).

The learned District Judge did not agree with the Master's conclusion that the reduction of $105,900 in the cost of operation was due to the injunction. He found that it was due to reduced wages, lowered prices for materials, and the abandonment of the West Belt Line (R., p. 118). Without ruling specifically upon the exceptions to the Master's report, he confirmed the Master's conclusion that the joint rate, if enforced, would continue to be confiscatory (R., p. 120). It is clear that this decision was based upon erroneous inferences and conjectures, and upon a misapplication of the supposed ruling of the Statutory Court.

Although the District Judge found that the discontinuance of the transfers had resulted in no substantial decrease in car mileage (R., p. 118), he assumed that upon a restoration of the same transfers there would be a 12½% increase in passengers and inferred that this would necessitate a ten per cent increase in car mileage, and that the total operating expenses would increase in exact proportion to the car mileage. From these assumptions and inferences he found that the increase in expense would be about $46,000 and that the probable additional revenue would not

exceed $42,000 (R., p. 119). "Upon this theory," he said, "the five cent joint rate, if restored, would be confiscatory" (R., p. 119). This is directly contrary to the Master's legal theory which the Court apparently approved. Taking the Master's basic figures, the addition of these increases to the revenue and expenses would show a net income of approximately $161,200, which is substantially over 6% upon the valuation of $2,600,000 which the Master found and the Court approved.

The learned District Judge evidently realized that this conclusion of his rested on very weak foundations, for he then continued:

> "But even though I be mistaken upon this feature of the case, there remains another obstacle to the contentions put forth by defendants. It is this: If the passengers * * * as to whom plaintiff would receive only two cents each * * * are to be considered as being only properly chargeable with such proportion of plaintiff's costs in carrying them and as is attributable to other passengers travelling over the line, there can be no doubt as to the propriety of granting the relief asked by plaintiffs."

Upon this point, he considered that the Statutory Court had given "approval to the theory," and said:

> "Such holding should, I think, be considered as the law of the case" (R., p. 119).

He continued:

> "Adopting as I do the ruling of the statutory court, and accepting the Master's calculation upon the number of passengers to

be carried, the cost of transporting each of them, whether by transfer or not, would be upwards of three cents. This cost, when added to fixed charges for borrowed money, would leave plaintiff without revenues sufficient to cover depreciation and a fair return on capital" (R., pp. 119, 120).

It will be shown in the Argument that the Statutory Court was mistaken as to both the law and the facts, and that the theories which it applied on the decision of the motion for injunction were not binding on the Court on final hearing.

The learned District Judge then added that "aside from the particular theory to be employed in determining whether the * * * order of October 29, 1912, is confiscatory," the granting of an increase by the Commission in June [error for July] 1920, was equivalent to a declaration that the order complained of was still confiscatory at the time of the final hearing, which was in or about October, 1923 (R., p. 120).

On the hearing before the Master, the plaintiff below introduced tabulations showing a comparison of the revenues and expenses prior to the injunction (January 31, 1921) with those subsequent thereto (R., pp. 148, 149, 174). These figures were not confined to the 59th Street line but included the figures for all lines operated by plaintiff (R., pp. 326, 328). This comparison is not appropriate, because the figures for the pre-injunction period included revenues and expenses from the West Belt Line, which was abandoned March 24, 1921 (R., p. 174), and also because wages and prices were higher in the earlier period (R., pp. 172, 178).

The Commission introduced tabulations comparing the results of operation on the 59th Street line for the different periods (R., pp. 430-433) and showing a loss of passenger revenue on that line since the injunction (R., pp. 408, 409). As there has been practically no reduction in the number of cars or car miles on that line since the injunction (R., p. 144) it is manifest that the loss in revenue was not offset by any compensating saving in operating expenses, and that the effect of the injunction was actually detrimental to the plaintiff. These tabulations will be further discussed in the Argument.

The plaintiff objected to, and the court enjoined, the requirement of transfers only in so far as they were exchanged with lines other than those of the Third Avenue system, of which plaintiff is a part (R., pp. 70-71). Since the injunction, the passengers and passenger revenues have increased on the Third Avenue line (R., pp. 410, 411) while a decline is shown on the parallel lines of the Second Avenue (R., pp. 412, 413) and of the New York Railways (Exh. CV., R., fol. 643), which are only one block distant. The other lines of the Third Avenue system also show increases in passenger revenue (R., pp. 414, 415, 416, 417). The result and undoubtedly the purpose of this injunction suit therefore was not to benefit the plaintiff as a separate corporate entity, but to divert traffic from competing lines to those of the Third Avenue Railway Company, which owns the capital stock of the plaintiff (R., pp. 406, 407).

Although contending in its Bill that each transfer passenger means a loss (R., p. 8), plaintiff gladly retains transfers with the lines of the

Third Avenue Railway System, of which it is a part. It recognized the fact, and informed the Court, that to enjoin transfers with other lines would divert much of the transfer traffic to lines of that System (R., p. 61).

The Third Avenue System embraces some ten or twelve street railway companies operating in the City of New York (R., p. 220) including the Third Avenue Railway Company, the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company, and the plaintiff. It operates 375 miles of surface street track (R., p. 138); the plaintiff only about four (R., pp. 179-180). The identity of interest and management is close. Company officials who testified for plaintiff occupied identical positions in each of the constituent companies (R., pp. 136, 138, 220). Cars bear the legend "Third Avenue Railway System" (R., p. 210) and not the names of any constituent company (R., p. 210). Tax reports are made for the "System" (R., p. 155). The Third Avenue Railway Company, the parent company, owns all the capital stock of the plaintiff and can therefore control its policy (R., pp. 406, 407).

The narrative form of the Master's Report, without separate and distinct findings of fact and conclusions of law, and the fact that the District Court did not pass specifically upon the exceptions to the Report, but merely confirmed the Master's ultimate conclusion that the five cent joint rate was confiscatory, made it necessary to frame the assignments of error presented with the petition of appeal in a more elaborate and detailed form than would otherwise have been

required. For the purpose of this Brief they will be stated in a more condensed and general form.

Specification of Errors.

It is submitted that the Court below erred:

1. In holding the order of the Commission of October 29, 1912, requiring transfers and fixing a joint rate of five cents therefor, to be confiscatory, and in confirming the conclusion of the Master to this effect, and in enjoining the enforcement of the order (Assts. of Error 1, 2, 4, 5, 6, 7; R., pp. 123, 124).

2. In holding that the restoration of the transfers would not produce sufficient additional revenue to reimburse plaintiff for the additional expense which would be imposed thereby (Assts. of Error 8, 9; R., p. 124).

3. In following the cost-per-passenger theory of the Statutory Court (Assts. of Error 10, 11, 13; R., p. 124).

4. In fixing the valuation of plaintiff's property at $2,600,000 (Asst. of Error 12; R., p. 124).

5. In holding that the Commission's order of July 9, ("June" in Asst. of Error is misprint) 1920, granting an increase in the joint rate, was equivalent to a declaration by the Commission that the five cent joint rate is confiscatory (Asst. of Error 14; R., p. 124).

6. In refusing to hold that the plaintiff had voluntarily assumed the obligation to perform

the service required by the order of October 29, 1912, and, having been incorporated and acquired its properties subsequent to such order, cannot complain of it as unconstitutional (Assts. of Error, 15, 22, 23; R., p. 125).

7. In refusing to hold that the Commission did not fail to decide the rehearing within thirty days after final submission (Asst. of Error, 16; R., p. 125).

8. In refusing to hold that the order complained of is a reasonable service requirement (Asst. of Error 18; R., p. 125).

9. In refusing to hold that the conduct of plaintiff disentitles it to equitable relief (Assts. of Error 17, 19; R., p. 125).

10. In holding that plaintiff had no remedy at law and in refusing to hold that the rate making process had not been completed (Assts. of Error 3, 24; R., pp. 123, 126).

11. In refusing to dismiss the Bill upon the pleadings (Assts. of Error 20, 21; R., p. 125).

12. In failing to separate the earnings, expenses and valuation of the 59th Street line from those of the other properties of the plaintiff (Assts. of Error 25, 26, 27; R., p. 126).

BRIEF OF THE ARGUMENT.

1. This Court has jurisdiction of this direct appeal from the District Court.

2. The transfer order was not confiscatory because:

(A) It was a reasonable service requirement.

(B) The additional expense which would be imposed by a resumption of transfers would not exceed the additional revenue which would be derived from the transfer passengers attracted thereby.

3. The cost-per-passenger theory applied upon the disposition of the motion for preliminary injunction and by the District Court on final hearing is erroneous.

4. The rate making process was not complete and plaintiff had not exhausted its legal remedies in the State Tribunals.

5. The plaintiff's own conduct in the matter has been such as to disentitle it to equitable relief.

6. The plaintiff voluntarily assumed the obligation to carry transfer passengers, pursuant to the order of October 29, 1912, for two cents each, and, having been incorporated and acquired its properties subsequent and subject to such order, is not entitled to complain of it as an infringement of any constitutional right.

7. The valuation placed upon plaintiff's property by the Court below was erroneous in law and fact and unsupported by competent evidence.

POINT I.

This Court has jurisdiction of this direct appeal from the District Court.

The jurisdiction of the District Court was invoked and exercised and necessarily depended upon allegations that the order complained of violated rights claimed by the plaintiff under the Federal Constitution.

The Public Service Commissions Law of New York (Chap. 48 of the Consolidated Laws) by §56 prescribes as follows:

> "1. Every * * * street railroad corporation * * * shall obey, observe and comply with every order made by the commission, under authority of this chapter, so long as the same shall be and remain in force. Any * * * street railroad corporation which shall violate any provision of this chapter, or which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission, shall forfeit to the people of the state of New York not to exceed the sum of five thousand dollars for each and every offense."

By subd. 2 of the same Section any violation of or failure to obey any such order by an officer or agent of such a corporation is made a misdemeanor.

By §§26, 28, 29 and 49 of the same Act, the Commission has power to control and regulate "through routes and joint rates." §49 was amended by Chap. 134 of the New York Laws of 1921, but the amendments merely extend and broaden the powers of the Commission. As the plaintiff has not at any time questioned the power

of the Commission to require transfers and fix joint rates, provided that the rates are not confiscatory, it is not deemed necessary to quote the statutes at length.

The order of the Commission thus has the force and effect of a State law or statute.

> See *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226.
> *Knoxville* v. *Water Co.*, 212 U. S. 1, 8.
> *Milwaukee Elec. Ry.* v. *Wisconsin R. R. Comm.*, 238 U. S. 174, 180.

This is therefore "a case in which the * * * law of a State is claimed to be in contravention of the Constitution of the United States" under §238 of the Judicial Code (Fed. Stat. Ann., 2nd Ed., Vol. 5, p. 794) and direct appeal to this Court is accordingly proper.

The practice of direct appeal to this Court in cases of this nature is so thoroughly established that citation of decisions on the subject would be superfluous.

POINT II.

The transfer order was not confiscatory because:

(A) It was a reasonable service requirement.

(B) The additional expense which would be involved by a resumption of transfers would not exceed the additional revenue which would be derived from the transfer passengers attracted thereby.

(A) This case does not put in question the entire rate structure of the plaintiff, nor does it necessarily involve the profitable or unprofitable results of its operations as a whole.

The order complained of and enjoined is primarily a service order, requiring the performance by the plaintiff of a specific incidental service for the convenience of the public of such a nature that the practice had been generally adopted by railroads for business reasons before it was required by law (see *Mich. Cent. R. R.* v. *Mich. R. R. Comm.*, 236 U. S., 615, 631).

Owing to the almost complete lack of diagonal streets on Manhattan Island—Broadway being the only one of importance—one of the great functions of the comparatively short cross town lines is to serve as links in the chain of transportation for passengers who wish to go up or down town and also east or west. There being no hypothenuse available the passenger must perforce travel along both the base and the perpendicular. This is for him but one journey, and he has for years counted on making it for one fare. The order complained of merely requires the performance of this reasonable service. Such an order will not be adjudged unreasonable, confiscatory and invalid, merely because it involves or may involve some slight loss.

This Court so held in *Chesapeake & Ohio Ry.* v. *Public Service Commission*, 242 U. S. 603.

Here the Public Service Commission of West Virginia had required the Chesapeake & Ohio Railway Company to install and maintain a passenger service of two trains a day on a branch line previously used for freight only, but declared by its charter to be " 'free to all persons for the transportation of their persons and property,' subject to the payment of the lawful charges for such transportation."

This Court pointed out that the required passenger service "would not presently be remun-

erative, but would entail a pecuniary loss" and said:

> "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. *Atlantic Coast Line Railroad Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 26; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 279; *Oregon Railroad & Navigation Co.* v. *Fairchild*, 224 U. S. 510, 529; *Chicago, Burlington & Quincy R. R. Co.* v. *Wisconsin Railroad Commission*, 237 U. S. 220, 229. That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are also to be considered. Cases *supra*. Applying these criteria to the order in question, we think it is not shown to be unreasonable."

See also

> *Railroad Commission* v. *Eastern Texas R. Co.*, 68 U. S. (Lawyers' Ed.) 309, 311, as follows:

> "So long as the railroad company 'continues to exercise' the privileges conferred by its charter, the State has power to regu-

late its operations in the interest of the public, and to that end may require it to provide reasonably safe and adequate facilities for serving the public, even though compliance be attended by some pecuniary disadvantage."

Also *Georgia Ry. Co.* v. *Decatur,* 262 U. S. 432, 433, 434, 440.

So in the case at bar, it would not be unreasonable to require the plaintiff to issue and receive transfers for a single fare, even if the share of such fares apportioned to plaintiff did not fully meet the additional expense imposed upon plaintiff by the requirement.

This principle is of itself a sufficient reason for dismissing the Bill. It will be shown in the next subdivision of this Point, however, that not only did the plaintiff fail to prove that the additional expense imposed by the transfers exceeded the revenue therefrom, but that, on the contrary, the evidence establishes precisely the reverse.

(B) The Master found in substance that the resumption of transfers would increase the total expenses of operation in round numbers $105,900 and that this increase would be in round numbers $59,500 more than the increase in revenue derived from the transfer passengers (R., p. 104). The District Court found that the increase in operating expenses would be about $46,000 and the increase in revenue about $42,000 (R., p. 119), a "slight loss," which, under the doctrine of the *Chesapeake and Ohio* case, *supra,* certainly would not render an otherwise reasonable service order invalid.

The Master's conclusions on this point were at variance with the undisputed evidence and this was recognized by the District Court (R., p. 118). The District Court's conclusion was based upon a wholly unwarranted conjecture or inference as to a probable increase of 10% in car mileage. As these points involve statistics and tabulations, they will necessarily have to be discussed in some detail.

In view of the lack of agreement between the Master and the District Court, this Court is especially called upon to exercise that "complete freedom in dealing with the facts" which it reserves to itself in cases of this character.

> See *Knoxville* v. *Water Co.*, 212 U. S. 1, 8.

The Master took as the basis of his conclusion the statements of revenues and operating expenses for the years ended respectively June 30th, 1921 (Exhibit BE, R., p. 330) and June 30th, 1922 (Exhibit BF, R., p. 332). The earlier period was principally a transfer period and the latter was wholly a non-transfer period. On his comparison of the revenues he found that there was a decrease in passenger revenue after the required transfers had been done away with by the injunction, amounting in round figures to $46,000. He therefore found that a resumption of transfers would increase the passenger revenue in this amount (R., p. 104). This conclusion was based upon the actual decrease in the number of transfer passengers after the injunction, and is not questioned upon this appeal.

The Master then proceeded to a comparison of the various items making up the expenses of operation in the two periods mentioned. He found an actual decrease in the period after the

injunction in each of the following items in the following approximate amounts (R., p. 104):

Maintenance of equipment	$17,000
Power Supply	20,000
Operation of Cars	53,000
Injuries to persons and property..	13,600
Total	$103,600

He concluded that a resumption of transfers would involve a corresponding increase. He also found that there would be an increase in taxes in the sum of $2,300, making a total increase in expenses of operation in the aggregate sum of $105,900 which he held would be caused by a resumption of the required transfers (R., p. 104).

It was here that the Master apparently was misled by that ancient logical fallacy, *post hoc ergo propter hoc.* He assumed not only without evidence to support such conclusion, but in disregard of evidence directly proving the contrary, that because certain decreases in expenses of operation were subsequent to the abolition of the transfers complained of, they were the result of such abolition. He also disregarded the well established rule that in such a case as this the order of the Commission must be assumed to be reasonable and proper and that the burden of proof is upon the person attacking it to show, not only that it is unreasonable, but that it is confiscatory.

See

San Diego Land Company v. *National City,* 174 U. S. 739, 754.

Minneapolis & St. Louis Rd. Co. v. *Minnesota,* 186 U. S. 257, 264.

Des Moines Gas Co. v. *Des Moines,* 238 U. S. 153, 163.
Darnell v. *Edwards,* 244 U. S. 564, 569.

In this case it was for the plaintiff to show that the decreases in expenses of operation were caused by the abolition of transfers, and that they were not due to other causes. Plaintiff failed to do so and the evidence demonstrates the contrary. Where other contributory causes of decrease were affirmatively shown by the Commission, it was incumbent upon the plaintiff, in full possession of the facts and figures, to adduce evidence upon which to apportion the total decrease among the different causes. The different items will be taken up separately.

1. Maintenance of Equipment, $17,000.

Upon this Point the Master said (R., p. 102):

> "There is no proof of any other cause operating to produce this decrease."

He entirely disregarded a most important contributing cause shown by the evidence, namely, the abandonment on March 24th, 1921, of over eight miles of track of the West Belt Line (Exhibit I; R., p. 297) and the consequent retirement of the equipment used for the operation of that line. He also brushed aside the 10% decrease in the cost of wages and materials testified to by plaintiff's own witness Farrington on cross-examination (R., pp. 172, 173, 178), upon the mere assumption that this decrease was not subsequent to June 30th, 1921. It is true that when Farrington gave this evidence he was being ques-

tioned concerning a comparison between the period February 1st, 1919-September 30th, 1920, and the period February 1st, 1921-September 30th, 1922. The precise date of the decrease was not stated. The fact of the decrease, as affecting a period after the abolition of transfers, having been proved, it was for the plaintiff to show its exact date if plaintiff deemed it material. It is believed that the decrease actually took effect in August, 1921. The District Court reached the proper conclusion upon this point, namely, that

> "the lessened outlay for operating expenses for the year ending June 30, 1922, when compared with like expenditures for the preceding year, is primarily to be attributed to reduced wages, lowered prices for materials and the abandonment of a portion of plaintiff's line of transportation" (R., p. 118).

2. Power Supply, $20,000.

Here the Master indulged in extraordinary conjectures, based upon nothing whatever in the Record, concerning the increase of power which he assumed would be required to move cars containing an additional load of transfer passengers. He wholly overlooked the fact that prior to March 24th, 1921, the Company was operating 8.831 more miles of track than it was in the year ended June 30th, 1922, after the abandonment of the West Belt Line. While it is true that the West Belt Line was operated with storage battery cars, nevertheless the power necessary to charge their storage batteries must have been supplied and paid for by the plaintiff and there is nothing in the Record to indicate that it requires any less

power to propel a car by storage battery than by underground current. In fact, it is believed that the reverse is the case.

Upon this point the Master also said (R., p. 102):

> "Obviously it would require a substantial "increase of car mileage to carry them [the "additional 2,000,000 passengers] and that "would require a substantial increase of "power."

This is contrary to the testimony of plaintiff's witness Thompson that, after the discontinuance of the transfers, plaintiff continued to operate the same number of cars on the 59th Street Line and that the mileage operated was substantially the same (R., p. 144).

The operation of the West Belt Line must have been unprofitable, or it would not have been abandoned. It was manifestly this legal amputation of a withered limb that brought financial relief to the plaintiff. The Master's disregard of this essential element vitiates all his conclusions. It was for the plaintiff to show how much of the decrease in the expense of operation was due to the abandonment of the West Belt Line. It did not do so, although such evidence was peculiarly within its knowledge. The necessary inference is that the evidence would have been unfavorable to its contentions in this suit.

3. Operation of Cars, $53,000.

Here again the Master overlooked the decrease in wages which made up the great bulk of this item and the still more important factor of the

abandonment of the West Belt Line. The Master said:

> "The shrinkage was undoubtedly the re-
> "sult of decreased car mileage" (R., p. 103).

He apparently attributed this decreased car mileage entirely to the discontinuance of the transfers, whereas as shown under the preceding item there was no substantial decrease of car mileage on 59th Street, and the difference in this item must therefore have been due to the abandonment of the West Belt Line, with its nearly nine miles of track.

4. Injuries to Person and Property, $13,600.

Here no causal connection between the smaller number of passengers after the discontinuance of transfers and the smaller amount of damage claims paid is shown. No account whatever is taken of the decreased field of operation due to the abandonment of the West Belt Line. Moreover, as a matter of common knowledge and experience, it is hardly to be supposed that the bulk of the payments made in the year ended June 30th, 1922, were for accidents which occurred during that year. Such expedition in either litigation or voluntary settlement is quite unprecedented.

5. Taxes, $2,300.

Here the comparison between the two periods discussed by the Master shows an actual increase in taxes in the post-injunction period. The Master found, however, that a resumption of transfers would increase the gross receipts approxi-

mately $46,000 and would therefore increase the total taxes by the 5% tax upon such increase in the gross receipts, being the sum of $2,300. Here the Master disregarded the provisions of §48 of the New York Tax Law under which all payments on account of the "gross receipts tax" are deducted from the amount of the franchise tax and therefore do not affect the total net amount of taxes paid by the Company unless the gross receipts tax happens to be larger than the special franchise tax. There is no proof or suggestion that it would be so in this case.

It thus appears that the Master was in error as to each of the items of expense of operation which he concluded or assumed would be increased by a resumption of the transfers. The actual decreases after the discontinuance of the transfers were shown to have been due largely, if not wholly, to other specific causes. Plaintiff's own witness Farrington admitted on cross-examination that he could not attribute any definite or even approximate portion of any of these decreases to the discontinuance of transfers (see R., p. 173). Upon this point the Master delivered himself of a most extraordinary utterance, saying:

> "The testimony is unimportant; perhaps "if the witness had been set to study the "figures as the Master has he might have "given a different answer" (R., p. 104).

The witness had testified that he had made a study of this very point (R., pp. 171, 172). It does not appear why the Master should have thus sought to draw inferences from the evidence more favorable to plaintiff's contentions than plain-

courage Commissions from ever granting rates substantially above the confiscatory point.

This Court has recently expressly held that the fixing by a Commission of higher rates does not establish that the former lower rates were confiscatory.

See

Prendergast v. *N. Y. Tel. Co.*, 262 U. S. 43, 46, 47.

The correctness of the position of the Commission is further emphasized by a comparison between the period from February 1st, 1921, to September 30th, 1922 (Exhibit BC; R., p. 326), which was wholly after the injunction, and the period from February 1st, 1919, to September 30th, 1920 (Exhibit BD, R., p. 328), which was wholly before the injunction. These two periods, of twenty months each, reflect the situation more comprehensively than the shorter periods discussed in the Master's report. A condensed comparative statement of the two Exhibits mentioned is as follows:

Revenues:	1921-1922	1919-1920
Total passengers	$866,434.35	$927,134.11
Advertising	15,440.04	14,635.03
Rent of buildings, etc.	73,970.78	36,641.27
Rent of tracks, etc.	1,250.00	2,125.00
Rent of equipment	———	1,100.00
Total revenue	$957,095.17	$981,635.41
Operating expenses and taxes	$750,842.84	$856,831.97
Interest on bonds	145,833.34	145,833.34
Interest on notes	6,974.70	6,244.79
Amortization, bond discounts	4,861.00	4,861.00
Total operating expenses and fixed charges	$908,511.88	$1,013,771.10
Balance	$48,583.29	D $32,135.69

It clearly appears that the favorable balance in the 1921-1922 period was not due to an increase in revenue. In that period the total revenue was $24,540.24 less, and the passenger revenue $60,-699.76 less, than in the 1919-1920 period. The favorable balance was due entirely to the decrease in operating expenses, which were $105,-989.13 less in the 1921-1922 period than in the 1919-1920 period. This was about the same in amount as the decrease found by the Master in his comparison of the two shorter periods discussed in his Report.

The items making up operating expenses and taxes in these two periods now under consideration as shown by Exhibits BC and BD (*supra*) are as follows:

	1921-1922	1919-1920
Maintenance of way, etc.	$103,729.90	$132,626.78
Maintenance of equipment	67,057.77	85,005.36
Power supply	64,217.51	81,428.08
Operation of cars	297,705.14	330,181.24
Injuries to persons and property	49,131.84	63,586.10
General miscellaneous expenses	40,664.35	41,430.49
Taxes	80,352.33	71,658.92
Hire of equipment	47,984.00	50,915.00
Total	$750,842.84	$856,831.97

This comparison is particularly interesting in that the decrease in the cost of operation of cars is almost exactly 10%, obviously resulting from the decrease of this percentage in wages of motormen and conductors which took place between the two periods (R., pp. 172, 173).

It is thus shown that the resumption of transfers at the five cent rate would substantially in-

crease the passenger revenue and would not increase the expenses of operation by any substantial amount, if at all.

The conclusion of the District Court was that the expenses of operation would be increased by a resumption of the transfers in just the amount (46,000, R., p. 119) found by the Master as the probable increase in passenger revenue, but upon some theory not made clear the District Court estimated the increase in revenue at only $42,000 (R., p. 119), $4,000 less than the Master's figures. The District Court's conclusion as to the increase in expenses was based upon a mere conjecture that an increase of 12½% in the daily number of passengers would require an increase of 10% in the mileage, although plaintiff's own witnesses established the fact that the elimination of the transfers had not brought about any substantial decrease in car mileage. If taking away the transfers did not decrease the car mileage, there is no basis for any inference that their restoration would increase it.

Even upon the District Court's figures, there was no confiscation and therefore no basis for the exercise of federal jurisdiction to grant relief. It is not necessary that the transfer traffic should show a profit. (See *Chesapeake & Ohio Ry.* v. *Public Service Commission*, 242 U. S. 603, 607). Upon the figures adopted by the Master, an annual aggregate of about 2,000,000 out of a total of about 16,000,000 passengers has been affected by the discontinuance of the required transfers (R., pp. 93, 102), that is, about 12½%. If this portion of the traffic is made even sub-

stantially self-supporting, the rate therefor cannot be confiscatory.

See

Minneapolis & St. Louis Rd. Co. v. *Minnesota,* 186 U. S., 257.

Puget Sound Traction Co. v. *Reynolds,* 244 U. S., 574.

Plaintiff has made no objection to carrying a much larger proportion of its traffic upon a two cent transfer basis, where the transfer passengers come from the Third Avenue System to which plaintiff belongs. This fixes the fair value of the service rendered. It does not become more valuable because a passenger transfers from Lexington Avenue instead of Third. The transfer Order to which plaintiff objects merely prevents this discrimination. The Record shows that in the "non-transfer" period considered by the Master, the two cent transfer passengers, who must have came from the Third Avenue Line, were about 5,700,000 in number, being about 40% of the total (R., p. 100).

What plaintiff really sought to do by this suit, and has accomplished by the injunction, has been not to protect itself from loss through compliance with the transfer order, but to divert traffic from the lines of the New York Railways System to the lines of the Third Avenue System. It has been willing to lose, as it has in fact lost, by the discontinuance of the transfers, if only the Third Avenue System might gain, as it has. This is shown by Exhibits CU, CV and CW, (Rec., pp. 410-412), from which it appears that since the discontinuance of transfers the Third

Avenue Line has had an uninterrupted series of increases in passenger revenue, while the Lexington and Second Avenue Lines, each only one block distant, show numerous decreases.

It is not within the proper functions of a Federal Court thus to assist one system in its competition with another.

Plaintiff has contended and the District Court appears to have been convinced (R., p. 118), that a resumption of transfers would cause overcrowding of cars and congestion of traffic, but these purely service questions are not within the purview of federal jurisdiction. The Federal Courts may be invoked to protect public utility corporations from confiscation, but the burden has not yet been cast upon them to protect the public from crowding. No additional car mileage operation has been ordered by the Commission, and there is no basis in the evidence for any inference that it would be furnished by the plaintiff without an order by the Commission.

The question of fact presented to the Court below was simply this:

> Would the expense of a resumption of the required transfers so far exceed the revenue therefrom as to be confiscatory?

The undisputed statistics of actual operation demonstrate that it would not.

Plaintiff's extraordinary Exhibit BP (R., p. 357, fol. 576), attempting to set forth the estimated results of a resumption of transfers, was purely conjectural and was properly given no weight by the Master or the District Court.

In short, plaintiff failed to prove its case, and the evidence as a whole shows that the improvement in plaintiff's financial condition since the injunction has been due to other causes, and not to the abolition of the required transfers.

POINT III.

The cost-per-passenger theory applied upon the disposition of the motion for preliminary injunction and by the District Court on final hearing is erroneous.

The plaintiff has contended, and the Statutory Court on the motion for preliminary injunction held in effect, that the cost of carrying each transfer passenger was to be determined by dividing the total expenses of operation (including interest on borrowed money) by the total number of all passengers carried, and that if the cost per passenger, as so determined, exceeded the amount received from each transfer passenger, the rate was confiscatory (R., pp. 68, 69). The District Court, on final hearing, followed this rule, apparently with some reluctance (R., p. 119).

This theory is wholly unsound and erroneous. It is deemed appropriate to present this question with some elaboration, since there appears to be no decision of this Court squarely on the point and it is one which Public Service Commissions are continually called upon to consider.

Transfer traffic upon street railroads is of a peculiar nature. Transfers increase the number of passengers by attracting persons who would otherwise prefer to walk a few blocks rather than pay two fares. This is an obvious

and necessary inference and it is confirmed by experience, both in general and as shown by this Record. When Judge Lacombe directed the discontinuance of voluntary transfers by the Receiver of the Third Avenue and Metropolitan Systems in 1908, the result was a loss of about 15,000,000 pay passengers and a decrease of $813,205 passenger revenue (R., pp. 379, 381). Some of these transfers were restored by the order involved in this suit. After they were again cut off by the preliminary injunction, the same Judge, as Special Master herein, found that plaintiff had lost about 2,000,000 passengers and $46,000 passenger revenue (R., pp. 95-96).

If the added traffic is so great as to require additional cars, it may create an added expense; but unless the traffic does increase to this extent, the transfers create a new source of revenue, with practically no added expense. There will be no appreciable increase in expense unless the added traffic requires more cars; and the amount of increase may be fairly measured by the added expense of operating the additional cars and the increased car mileage, if any. The evidence in this case shows that while there was a loss in passenger revenue (R., pp. 408-409), there was practically no reduction in the number of cars or car miles operated (R., p. 144).

The loss in passenger revenue would have been shown as substantially greater, if the comparison had not been made with a pre-injunction period which included the months of February and March, 1920, when the revenues were cut down by the great snow storm which began on February 4, 1920, and seriously affected traffic conditions for several weeks thereafter (R., pp. 240-244).

If more money is made with transfers than without them, their requirement cannot infringe any right of the Company. If they bring in enough additional revenue to meet such additional cost as there may be and leave something over to be applied to fixed charges, they are beneficial to the Company (See R., p. 382).

This would be true even if the total revenue from the regular five cent fares were insufficient to give a reasonable return on the fair value of the property. If capital has been unfortunately invested, courts are as powerless as business men to make it remunerative. There is here an investment in fixed capital which cannot be withdrawn without loss; fixed charges accumulate and must be met; the Company provides a service, not a commodity which can be withheld for higher prices; and its profits must come from its patronage, which should be stimulated rather than discouraged. Courts may enjoin a lower rate but cannot compel persons to ride at a higher one; and it is good business policy for a carrier to take such additional revenue as it can get, rather than to wait in vain for patronage which will not come at higher rates.

The comparison with a commodity is interesting and enlightening. An illustrative case will make this clear. If it costs a Gas Company $1,000 to manufacture and distribute 100,000 cubic feet of gas, and it is allowed to charge only eighty cents per 100 cubic feet, it suffers a loss of $200 on each 100,000 cubic feet manufactured and sold, and the more it manufactures and sells the more it loses. On the other hand, a street railroad must maintain a certain scale of service under its franchise. If it costs such a railroad $2,500 per day to operate a given

scale of service, and it carries 50,000 passengers at five cents each, it neither gains nor loses. If, in addition to the 50,000 passengers at five cents each, it carries 5,000 more at two cents each, without increasing its scale of service, its cost of operation is not increased and it makes $100. To argue from the average cost of carrying a certain number of passengers, resulting in an ascertained loss, that to carry a larger number would result in a proportionately greater loss, is a *reductio ad absurdum*. The reverse is true; the more passengers a railroad carries upon a given scale of service the more it makes or the less it loses.

The Court below also erred in including interest on indebtedness as a part of operating expenses for the purpose of computing the cost of carrying passengers. Interest paid on indebtedness is not a part of operating expenses, but is *pro tanto* a return on capital (see *Northern Pacific Ry.* v. *North Dakota*, 236 U. S. 585, 592). Invested capital takes the form both of stock and of bonds or other evidences of indebtedness. When a company properly pays out of current income interest upon its bonds, this shows that it is earning and paying some return on some of the money invested in the enterprise.

It appears from the opinion of Judge Knox that he felt himself bound to adopt the theory enunciated by the Statutory Court, and to regard it as the "law of the case," and it seems not unlikely that without it he might have reached a different conclusion.

Whatever deference he may have felt impelled to show to the opinion of the three learned Judges who composed the Statutory Court, it certainly was not binding upon him as an adjudi-

cation in the cause. All that it actually determined was that upon the *ex parte* affidavits submitted on the motion for preliminary injunction, the Court thought it proper to enjoin the enforcement of the transfer order until all the facts could be brought out on the trial and determined. Upon one most important point it was demonstrated by the evidence and found by the Master that the Statutory Court was mistaken. That Court found that the "deficits produced by plaintiff's carriage of a *majority* of all passengers for two cents a piece amount to or result in confiscation" (R., p. 69). The Master and the Trial Court both found that the transfer order complained of affected only 12½% of the total number of passengers (R., pp. 102, 119). This removes the very foundation from the decision on the motion for injunction. A rate might be confiscatory if required in the case of a majority of all the passengers carried by a street railroad and yet amply compensatory if compulsorily applied only to a small proportion of additional passengers attracted by the reduced rate and carried with no corresponding increase in operating expenses.

Even if the decision on the motion for injunction had been actually the "law of the case," this Court has pointed out that "that phrase expresses only the practice of Courts generally to refuse to re-open what has been decided, not a limit to their power."

See

King v. *West Virginia,* 216 U. S. 92, 100.
Remington v. *Central Pacific R. R. Co.,* 198 U. S. 95, 99, 100.
Messenger v. *Anderson,* 225 U. S. 436, 444.

In any event, the whole case is now before this Court for plenary review and it is hoped that this Court will lay down, as the correct rule for the guidance of Public Service Commissions, that a service requirement is not confiscatory unless it imposes an additional expense unreasonably in excess of the additional revenue which it produces, and then only if the total business fails to yield an adequate return on the fair value of the property used and useful in the public service.

POINT IV.

The rate making process was not completed and plaintiff had not exhausted its legal remedies in the State Tribunals.

In May, 1920, the Receiver of the New York Railways Company made his application to the Commission, asking that these 59th Street transfers be abolished (R., p. 393). After a hearing on this application had been ordered (R., p. 401), the plaintiff injected itself into the proceeding, doubtless in order to guard against the possibility of having the transfers to the Third Avenue System lines abolished with the rest (R., p. 351), thus showing that that System desired to retain the transfers, which plaintiff, as a part of it, alleged to be confiscatory when exchanged with lines of the New York Railways System.

In July, 1920, one year after the Commission had permitted the Receiver of the New York Railways to charge two cents for other transfers (R., p. 399), it made an order increasing the joint rate with the 59th Street line from five to seven cents (R., p. 49). This determination was

probably made principally to avoid discrimination between these joint rate transfers and the other transfers for which the Receiver was collecting two cents.

Plaintiff, a mere intervenor in that proceeding, was the first to ask for a rehearing, which it did on July 23, 1920 (R., p. 402). The Commission took no immediate action on this application, but waited for the Receiver to act. Later, on August 28, 1920, the Receiver made a similar application (R., p. 403) and on August 31, 1920, the Commission granted it and suspended the increase pending the determination of the rehearing (R., p. 405).

The taking of testimony on the rehearing was concluded on November 10, 1920 (R., p. 138). Section 22 of the Public Service Commissions Law, which authorizes and regulates rehearings, provides in part:

> "§22. REHEARING BEFORE COMMISSION. After an order has been made by a commission any corporation or person interested therein shall have the right to apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such a rehearing if in its judgment sufficient reason therefor be made to appear; if a rehearing shall be granted, the same shall be determined by the commission within thirty days after the same shall be finally submitted."

On November 29, 1920, the attorneys for the Receiver wrote to the Commission, suggesting numerous corrections in the minutes of the rehearing (R., p. 426). Counsel to the Commission replied on December 7, 1920 (R., p. 428); and the attorneys for the Receiver wrote again on December 16, 1920 (R., p. 429), the very day

on which the plaintiff filed its Bill of Complaint, in which it was alleged that the Commission had neglected and refused to determine the rehearing although requested by the plaintiff to do so (R., pp. 10, 11). It should be noted that plaintiff introduced no evidence before the Master that it had requested the Commission to determine the rehearing or that the Commission had refused to do so.

Plaintiff wholly failed to prove the facts necessary to support its contention that the Commission ought to have determined the rehearing by December 10th, 1920. The determination is required to be made within thirty days, not from the time the taking of testimony is concluded, but from the time when the rehearing is "finally submitted," and it had not been finally submitted when plaintiff brought suit on December 16th. Until the questions raised by the Receiver as to the accuracy of the Stenographer's Minutes had been disposed of, the case could not be regarded as finally submitted, inasmuch as neither the petitioners nor the Commission could know what the evidence was on which the determination should be made.

The Stenographer's Minutes of the rehearing show the entry, on November 10, 1920, that the Commissioner said "The case is closed" (R., p. 138). This does not signify that there was at that time a final submission of the case within the meaning of §22 of the Public Service Commissions Law. In an equity suit tried before the Court or a Referee the case would be described as "closed" when both parties had rested and the testimony was concluded. If thereafter either

party should wish to introduce further evidence, he would move to "reopen the case." But the case would not be deemed "finally submitted" until all the briefs and requests to find were filed.

The practice is a familiar one in New York. Section 470 of the Civil Practice Act (formerly §1019 of the Code of Civil Procedure) provides that either party may terminate a reference, if the Referee fails to render a decision "within sixty days from the time when the cause or matter is finally submitted to him." It has been frequently held under this section that the sixty day period does not begin to run from the closing of the testimony, but from the final submission of all briefs and other papers.

See

Matter of Robinson, 53 Misc. (N. Y.) 171, 183.

Burritt v. *Burritt,* 53 Misc. (N. Y.) 26.

In like manner, the closing of a public hearing before a Public Service Commission is not equivalent to final submission unless it is expressly so stated on the record. Further time may be allowed, either by formal direction or informal acquiescence, for the correction of errors in the Record, the authentication and submission of Exhibits, the preparation and submission of briefs and other purposes. In the matter under consideration certain important corrections of the Stenographer's Minutes were proposed, not by the Commission, but by one of the parties (see Exhibits DD, DE, DF, R., pp. 426-429). These corrections were never completed and hence the case was never finally submitted.

The statutory provision for a decision in thirty days after final submission upon a re-hearing is directory and not jurisdictional.

See

Mt. Konocti Light & P. Co. v. *Thelen*, 150 Pac. 359; P. U. R., 1915 E. 291, 293.

A few days delay is neither a refusal nor a failure to decide, in law or in fact. Ordinary good faith called for at least a request for a decision by the Commission before a resort to the Federal Courts. Instead there was an ingenious manipulation of procedure by one party, resulting in a short delay in final submission, while the other party (this appellee) prepared its Bill and moving papers and invoked the federal jurisdiction.

Moreover, the two cent share of the joint rate, allocated to this plaintiff and now objected to by it as inadequate, was never fixed by the Commission; it was agreed upon by the interested parties (R., p. 306). Manifestly the Third Avenue System had a potent and probably controlling voice in the agreement. It may well be that if the plaintiff had insisted on a larger share and had applied to the Commission for relief a different apportionment would have been made. The average length of ride is not necessarily controlling. Street car fares in New York City are not determined by the length of the ride. In the apportionment of a joint rate between an up-and down-town line and a cross-town line there are other elements to be considered. Owing to the configuration of Manhattan Island, it is highly probable that a larger proportion of cross-town

traffic is made up of passengers who use the cross-town line as merely one link in a longer journey than is the case with up-and down-town traffic. If the transfer traffic is thus a more important part of the whole business of the cross-town line, that line may have good grounds to ask for a larger proportion of the joint rate than the up-and down-town line, even if the latter gives to the transfer passenger a longer average haul. A short cross-town line has many more points of intersection with other lines in proportion to its length than a long up-and down-town line.

It has been very recently held by this Court that mileage haul is not the only factor in the division of transit rates. See *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 284 and cases cited.

It is significant that the Receiver of the New York Railways, although one of the moving parties in the application to the Commission for an increased joint rate and in the subsequent application for a rehearing, never joined in this suit or otherwise sought to enjoin the enforcement of the transfer order, except by appearing as *amicus curiae* on the motion for preliminary injunction.

It thus appears that the legislative process for the fixing of the *two cent* rate formerly received by plaintiff has not only not been concluded, but has not even been initiated. The two cent rate was voluntarily accepted by the plaintiff and it should not be heard to complain of it, at least until it has applied to the Commission for a larger share. Plaintiff's resort to the Federal Court was therefore premature as well as unfounded.

POINT V.

The plaintiff's own conduct in the matter has been such as to disentitle it to equitable relief

The constitutional question of alleged confiscation is the only basis for Federal jurisdiction in this case. But even where the allegations of confiscation are such as to confer jurisdiction the general rules of equitable jurisprudence apply to equitable remedies. A plaintiff seeking equitable relief in the Federal Court, as in any other Court of Equity, must show that his own conduct has been equitable and that his position is fair. This the plaintiff does not do. The reverse is the case. By the Order of July 9th, 1920, the Commission awarded a liberal increase in the joint rate, which the statistics of subsequent operations show would have been not only compensatory but profitable. Plaintiff rejected this and strenuously objected to any joint rate at all. Then without waiting a reasonable time for a decision on the rehearing or even asking for a decision, it took advantage of a very brief delay caused by its co-applicant's maneuvers and came into the Federal Court on an allegation of the Commission's refusal to act.

At no time has plaintiff sought relief by applying to the Commission for a re-apportionment of the joint rate. It has stood upon the proposition that any joint rate is confiscatory.

It has not objected to continuing operations under the required joint rate in the exchange of transfers with the Third Avenue System. It appears from the statistics in evidence (R., pp. 410-412) that this has resulted in diverting to

the Third Avenue Line a substantial part of the traffic which formerly went to the other up-and down-town lines with which transfers were then exchanged. A resort to the Federal jurisdiction upon allegations of confiscation, for the purpose, not of any direct improvement in plaintiff's financial condition, but of discriminating against lines with which plaintiff is not connected and favoring the system to which plaintiff belongs, is a perversion of the purpose for which the Federal Courts were established. This alone demonstrates the complete lack of equity in plaintiff's case. Plaintiff did not seek to protect its own interests as a separate Corporation, but acted as a stalking horse for the Third Avenue System.

It carries without objection 40% of its passengers upon Third Avenue transfers for two cents each, but objects to being required to carry 12½% of them on other transfers. The Federal Courts should not be called upon to assist it in thus straining at the gnat while swallowing the camel.

POINT VI.

The plaintiff voluntarily assumed the obligation to carry transfer passengers pursuant to the order of October 29th, 1912, for two cents each, and having been incorporated and acquired its properties subsequent and subject to such order, it is not entitled to complain of it as an infringement of any constitutional right.

This question was presented by the motion to dismiss the Bill which was denied by Judge Hough, who at the same time overruled the Secone Separate Defense, setting up this point, as insufficient in law (R., p. 78). It therefore did not come before the Master (R., p. 87) or before the Court on final hearing, but it is properly before this Court on appeal from the final decree.

The transfer order was made on October 29, 1912, against the Central Park, North and East River Railroad Company (R., pp. 15-26), which formally accepted the order (R., p. 391, fol. 613) before its property was sold under foreclosure (R., p. 265, fol. 460). The purchaser subsequently, on December 24, 1912, organized the plaintiff pursuant to the provisions of Section 9 of the Stock Corporation Law (R., pp. 286-288), and later conveyed the property to it (R., p. 279). It will be observed that the Statutory Court fell into error on this point, and described the plaintiff as having been incorporated in 1911 (R., p. 67), which would have been prior to the transfer order.

Section 9 (now §96) of the Stock Corporation Law (N. Y. Consolidated Laws, Chapter 69) provided:

> "§9. *Reorganization upon sale of corporate property and franchises.*—When the

property and franchises of any domestic stock corporation shall be sold by virtue of a mortgage or deed of trust, duly executed by it, or pursuant to the judgment or decree of a court of competent jurisdiction, or by virtue of any execution issued thereon, and the purchaser, his assignee or grantee shall have acquired title to the same in the manner prescribed by law, he may associate with him any number of persons, not less than the number required by law for an incorporation for similar purposes, at least two-thirds of whom shall be citizens of the United States and one shall be a resident of this state, and they may become a corporation and take and possess the property and franchises thus sold, and which were at the time of the sale possessed by the corporation whose property shall have been so sold, upon making and acknowledging and filing in the offices where certificates of incorporation are required by law to be filed, a certificate * * * [then follow provisions as to contents of certificate] * * *

Such corporation shall be vested with, and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation last owning the property sold, or its receiver, and *shall be subject to all the provisions, duties and liabilities imposed by law on that corporation.* [In its present form, the last clause reads: "all the duties imposed by law on that corporation."]

By the terms of the statute under which it was incorporated, plaintiff was thus made "subject to all the provisions, duties and liabilities imposed by law" on its predecessor, the Central Park, North and East River Railroad Company.

By coming into existence and acquiring its properties subject to the conditions laid down in the statute, plaintiff voluntarily submitted to and accepted the transfer order; it was not imposed upon it *in invitum*. As the transfer order was in force when plaintiff took its charter, there was no violation of the Fourteenth Amendment. Plaintiff's constitutional rights cannot have been infringed by a lawful exercise of governmental power which antedated its existence.

It is to be noted that there is no suggestion that the *statute* under which the transfer order was made in any way violates the Constitution.

The question of the effect of the incorporation of a Company after the passage of a statute which affects its operations has been squarely decided by this Court.

> See *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79.

The Railway Company there concerned was incorporated after the passage of a Massachusetts Law requiring the transportation of public school pupils at half fare. The Company contended that the statute was unconstitutional in that it denied to the Company the equal protection of the laws and deprived it of its property without just compensation and without due process of law. The Railway Company offered to prove that the actual cost of transportation of each passenger was considerably greater than half the regular fare. This offer of proof was rejected and it was held by the State Court that the statute was not repugnant to the Fourteenth Amendment. This was affirmed by this Court upon the ground

that "the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter." The Court considered that the effect was the same as if the statute complained of had been written into the charter itself, so that the acceptance of the charter was in effect an acceptance of the statute.

The learned Circuit Judge who denied the motion to dismiss distinguished this case on the ground that a general statute was a very different thing from a regulatory order of a Commission (R., p. 76, fol. 119). This distinction is unsound.

The proceedings of a Public Service Commission are legislative in character (*Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226 and other cases cited, *supra*, p. 19). Regulatory orders are made in exercise of a delegated legislative power and require the same obedience as statutes. This order was made pursuant to the Public Service Commissions Law, Section 49, subdivision 3. The duty to comply with it was expressly imposed by another provision of the statute (Public Service Commissions Law, Section 56, subdivision 1):

> "Section 56. FORFEITURE; PENALTIES. 1. Every common carrier, railroad corporation and street railroad corporation and all officers, and agents of any common carrier, railroad corporation or street railroad corporation shall obey, observe and comply with every order made by the commission, under authority of this chapter so long as the same shall be and remain in force." * * *

A regulatory order made under the authority of the statute thus has the force and effect of a

statute and is equivalent thereto. Section 56 requires the corporation to obey the orders which it has authorized the Commission to adopt, thus imposing a duty as directly as the Massachusetts legislature did.

The decisions in the state courts, on which the learned Circuit Judge relied as an alternative support (R., p. 76), are not authority for the proposition that plaintiff has the same right to complain as its predecessor would have had. *Minor* v. *Erie R. R. Co.*, 171 N. Y. 566, held that a reorganized corporation, incorporated after the Mileage Book Act was passed, was subject to the provisions of it although the act had been declared unconstitutional as to its predecessor.

The learned Circuit Judge apparently based his opinion upon a remark made *arguendo* in the course of the opinion in the *Minor* case and upon an amendment to the statute which followed that decision. At that time, the statute provided that the new corporation should be "subject to all the provisions, duties and liabilities imposed by law on such *corporations.*" This, said Chief Judge Parker (page 572), indicated a purpose to subject the new corporation to all the general provisions of law governing railroad corporations; had the statute read "on such *corporation*" the new corporation would not have been subject to the Mileage Book Act, for that had been held unconstitutional as applying to corporations in existence at the time of its passage. In 1904, subsequent to this decision, the statute was amended by changing "such corporations" to "that corporation" (Laws of New York, 1904, Chapter 706).

It is clear that thereafter a new corporation would not be subject to all provisions governing railroad corporations but only to those governing the predecessor corporation; but it is just as clear that the new corporation would be subject to all the provisions of law governing its predecessor. Now, the transfer order did apply to and govern its predecessor. The Circuit Judge said that the presumption was that it was a perfectly proper order (R., p. 76). The presumption is strengthened by the fact that the predecessor corporation accepted it (R., p. 391) and that plaintiff obeyed it without question for nearly eight years. It follows that, as the transfer order was a proper one imposed by law on "*that* corporation," *i. e.*, the predecessor, the plaintiff became subject to it according to the express language of the statute.

The case of *People ex rel. Third Avenue Ry. Co.* v. *Public Service Commission,* 203 N. Y. 299, also cited by the Circuit Judge, does not affect in any way the questions here presented. It did not involve the particular provision of the statute mentioned above. The question in that case was not whether the new corporation was subject to any of the duties and liabilities imposed upon the old, but whether certain sections of the Stock Corporation Law were repealed by the provisions of the Public Service Commissions Law. The Court held that both were effective.

The *Interstate Railway* case, *supra,* disposes of the contention that unconstitutionality of the original order may be predicated upon "changed conditions" (R., p. 120). If that contention could have been successfully urged as a ground for invalidating the Massachusetts half-fare

statute the evidence offered, and held to have been properly rejected, would clearly have been competent and admissible.

It appears from the Record and Briefs in that case that the statute in question was passed in 1900; that the railroad company was incorporated in 1901, and took over the property of a former corporation; that the proceedings were begun in 1903 and the trial held in 1904; and that the offer of proof related to the fiscal year ending Sept. 30, 1903, some three years after the passage of the statute.

This point is urged upon this Court independently of appellant's other arguments. If it be sustained, the others need not be considered.

POINT VII.

The valuation placed upon plaintiff's property by the Court below was erroneous in law and fact and unsupported by competent evidence.

If this Court shall decide to grant a reversal on Points IV, V, or VI, *supra,* or shall hold that the proper test to apply is that set forth under Point II, namely, whether the additional expense of the transfer traffic substantially exceeds the additional revenue, the question of valuation will not necessarily arise. In fact, valuation is a major issue only in cases involving the whole rate structure and the entire net revenue of a public utility. Where the rate attacked is that fixed for a specific and incidental service, it is not necessarily material what rate of return the public utility earns upon its entire operations.

If the general rate is less than compensatory it may well be due to wholly different causes, unrelated to the special rate attacked. On the other hand, an amply compensatory average rate on its business as a whole is additional justification for reasonable service requirements, even if, by themselves, they involve some slight loss.

If this Court shall reach the conclusion that the required transfer traffic would be substantially self supporting it need not consider the question of valuation at all.

The question of valuation having been raised in and passed upon by the Court below, it is necessary to deal with it upon this appeal. This will be done in detail by the New York Corporation Counsel, representing the District Attorney, in whose admirable brief on this subject the Commission joins. To avoid burdening the Court with unprofitable repetition, the position of the Commission on this point will merely be briefly stated as follows:

The valuation of $2,600,000 fixed by the Court below is erroneous because:

(a) It is based upon an inventory which includes property not shown to belong to plaintiff.

(b) It is not supported by competent evidence of value as to the property included.

(c) It is based upon an erroneous theory, namely, present cost to reproduce, less expense of putting into good operating condition (erroneously styled depreciation) and does not even purport to represent "present fair value" as defined by the decisions of this Court.

SUMMARY.

1. The true test to be applied in this case is whether the additional expense of the transfer traffic so far exceeds the additional revenue derived therefrom as to be confiscatory. The uncontradicted evidence shows conclusively that it does not.

2. The rate-making process was not complete; the plaintiff had not exhausted its legal remedies; and its own conduct disentitles it to equitable relief.

3. The plaintiff's incorporation subsequent to the order complained of bars it from questioning the constitutionality of such order.

4. The valuation made by the Court below is erroneous and unsupported by competent evidence.

CONCLUSION.

The decree appealed from should be reversed, the injunction vacated, and the cause remanded with instructions to dismiss plaintiff's bill on the merits with costs in both Courts.

Respectfully submitted this 9th day of February, 1925.

HOWARD THAYER KINGSBURY,
Special Counsel to Transit Commission.

GEORGE H. STOVER,
Assistant Counsel,
Counsel for Appellant, Transit Commission.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 465.

JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and TRANSIT COMMISSION, State of New York,

Appellants,

against

BELT LINE RAILWAY CORPORATION.

BRIEF IN REPLY
for Appellant Transit Commission.

HOWARD THAYER KINGSBURY,
Special Counsel to Transit Commission.

GEORGE H. STOVER, *Assistant Counsel.*

Counsel for Appellant Transit Commission.

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 465.

JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and TRANSIT COMMISSION, State of New York, Appellants, vs. BELT LINE RAILWAY CORPORATION.	

BRIEF IN REPLY
for Appellant Transit Commission.

The Brief submitted by the Appellee bases many of its principal arguments, not upon the statistics of actual operations since the injunction, but upon the unfounded hypotheses and unproved conjectures embodied in its Exhibit BP, which is doubtless a great work of the creative imagination but has so little relation to the facts of this case that neither the Master nor the District Court deemed it necessary to pay any attention to it. Counsel for this Appellant

deem discussion of these arguments equally unnecessary, but think it proper to comment briefly on certain of the other arguments and assertions of the Appellee.

I.

The Effect of the Injunction.

It is most significant that Appellee now expressly states that

> "at no time has the Belt Line Company "claimed that the decrease of expenses ac- "tually incurred after the injunction was "due to the cutting off of the transfers" (Appellee's Brief, p. 61).

This is just what this Appellant has always argued, but it is wholly at variance with the theory upon which the Master decided the case.

This shows that Appellee's Counsel realizes that the actual facts of operation do not support the Master's decision, and therefore takes refuge in part in the cost-per-passenger theory, and in part in the assumed result of a resumption of transfers, based upon a fallacious theory that expenses of operation increase proportionately with the number of passengers carried. Appellee's Counsel states that this proposition is "undisputed" (Brief, p. 32). On the contrary, it is not only disputed, but disproved.

The rule must work both ways, if it works at all. If expenses increase proportionately with an increase of passengers they must decrease proportionately with a decrease. Appellee's Counsel contends that the decrease in the total number of passengers was due to the cutting off

of the transfers (Brief, p. 25), but by admitting that the decrease of expenses was not due to this cause, he necessarily admits that it was not due to the decrease in the number of passengers. The Record shows that it could not have been, since the actual service was not substantially decreased.

Upon Appellee's own theory on this point, it has no grievance, and can have none, unless more service is required, and the requirement enforced or sought to be, and the additional expense of such additional service duly proved. The alleged proportionate increase in expense having been both disproved and admitted away, there is nothing in the Record on which to predicate any finding on this point.

The letters from the Commission directing more service on 59th Street (Rec., pp. 307, 308, 311, 314, 321) were not orders, made after a hearing and thus having any binding force. It will be time enough to consider the effect of such orders if and when they are made. The question of actual or potential overcrowding is not and cannot be before this Court.

The statements of Appellee's counsel concerning the effect of the testimony of William O. Smith, Transit Inspector (Brief, pp. 30, 58) are not correct. The witness testified that the service on the 59th Street Line *could* be increased about 10%, not that it *should* be (Rec., pp. 248-251). The increase which he suggested was only in the "rush hours" (Rec. p. 249). There was no suggestion by any one of any increase in service through the other hours of the day.

The testimony of Appellee's witnesses Thompson and Farrington in regard to the alleged proportionate increase in number of passengers,

car mileage and expenses, was all a matter of opinion and conclusion, was based upon the assumption that more cars and mileage would be required to carry an increased number of passengers than actually served to carry them before the injunction, and ignored the manifest fact that certain important expenses of operation, such as administration and overhead, taxes, maintenance of way and the like, are unaffected by changes in the number of passengers.

Appellee's argument, so far as it proves anything, proves that the injunction decreased rather than increased the revenue, and did not decrease the expenses of operation but merely relieved the 59th Street Line from overcrowding, a matter not within the cognizance of this or any Federal Court.

The actual adverse effect of the injunction upon the revenue, and its negative effect upon the expenses, as proved and admitted, sufficiently dispose of Appellee's conjectural computations of imaginary deficits which he asserts would result from a restoration of the transfers, but which are unsupported by the evidence or the Master's findings.

II.

The Exhaustion of Legal Remedies.

Appellee contends that, because this Court has held that application for a re-hearing is not necessarily a condition precedent to resort to the Federal Courts (Brief, p. 36), it was unnecessary for it to await the orderly determination of the actual re-hearing. This is a *non sequitur.*

The fact that the granting of a re-hearing is discretionary may dispense from applying for it before invoking the Federal jurisdiction, but where a party has applied for and been granted a re-hearing, and has thus availed himself of this legal remedy, even if resort to it be optional, he cannot be deemed to have exhausted it unless and until the re-hearing has been determined or there has been an actual and wrongful refusal or neglect to determine it.

The pleadings elaborately quoted by Appellee's Counsel (Brief, p. 39) fall far short of an admission of final submission sufficient to start the thirty day period running and the answer quoted from expressly denies refusal or wrongful neglect to decide (Rec., p. 51).

The proof that there had not been a final submission seems to have touched a sensitive spot. It is the Appellee's Counsel who suggests the insinuations to which he so vehemently objects. Counsel for this Appellant merely stated the facts, and left it to the Court to draw its own inferences. The proof in question was made in due season before the Master at the session of January 5, 1923, some six weeks before the close of the Reference on February 14, 1923 (Rec., pp. 237, 252, 262, 263). The point was argued before the Master, and not withheld undisclosed until the argument before the District Court, as stated by Appellee's Counsel (Brief, p. 42). Appellant's Counsel do not consider it necessary to enter into a debate with their adversary over his characterization of this well founded and serious contention.

The case cited by Appellee's Counsel (*Nor. Pac. Ry.* v. *North Dakota,* 236 U. S. 585), to support his contention that the voluntary apportionment

of the joint rate sufficiently completed the compulsory rate-making process (Brief, p. 42), is not in point on this question. There the *State* Court had held that "the result, in substance, would have been the same" (p. 592), and this Court held that the facts thus found by the State Court "must be taken to be established" (p. 593). It does not appear that this Court has ever held that the voluntary apportionment of a joint rate is equivalent to the compulsory fixing of each share by the rate-making authority.

III.

Voluntary Acceptance of Rate by Appellee.

The annulling by the Commission of the new tariff filed by plaintiff was not the compulsory fixing of a rate by the Commission (see Appellee's Brief, p. 47). It merely prevented the plaintiff from thus evading the order of October 29th, 1912, which was in effect prior to plaintiff's incorporation.

By its incorporation plaintiff succeeded to the obligations of its predecessor. Among these obligations was the obligation to carry transfer passengers for a five cent joint rate. This was not an unconstitutional requirement as to the predecessor, so the case does not come within the exception suggested by the dictum in *Minor* v. *Erie R. R. Co.*, 171 N. Y., 566, invoked by Appellee (Brief, pp. 69, 70).

That case is a direct authority in support of this Appellant's position, as a brief review of its facts will show.

In 1895, the New York Legislature passed the Mileage Book Act, effective June 15, 1895, re-

quiring railroad corporations to issue mileage books entitling the holder to travel 1,000 miles over their roads at a reduced rate. In an action brought against the New York, Lake Erie and Western Railroad Company and its Receivers to recover a penalty for failure to issue such mileage book, the Court of Appeals held that the act was unconstitutional, as the company had been incorporated prior to its enactment (*Beardsley* v. *N. Y. L. E. & W. R. R. Co.*, 162 N. Y. 230). After the act became effective, namely on November 14, 1895, the Erie Railroad Company was incorporated under Section 3 of Chapter 688 of the Laws of 1892 (*Stock Corporation Law,* Sec. 9), and acquired the property of this same New York, Lake Erie and Western Railroad, *which had been sold under foreclosure.* In another action for a similar penalty brought against the Erie Company, the Court of Appeals held that the Act was not an infringement of that company's constitutional rights, since the company had been incorporated after it became effective (*Minor* v. *Erie R. R. Co.*, 171 N. Y. 566).

This disposes of the contention that the Belt Line Railroad Corporation in acquiring the property and franchises of its predecessor also acquired the right to contest the validity of the transfer order. The Court of Appeals refused to nullify the provision which subjected the new corporation to the duties imposed upon the old, or to hold that the "rights, privileges and franchises" of the old included the right to contest something which the new company had accepted as a condition of its creation.

As has been pointed out in this Appellant's main Brief (pp. 54-55), the subsequent amendment of Section 9 did not destroy its force nor the effect of the *Minor* decision, but merely limited the duties, which the new corporation was required to assume, to such as applied to its predecessor and not all those which apply to all railroad corporations generally.

IV.

The Cost-per-Passenger Theory.

Appellee evidently places its main reliance on this erroneous theory. It has never been sustained or enforced by this Court. The case invoked by Appellee (*Nor. Pac. Ry.* v. *North Dakota,* 236 U. S. 585) does not enunciate or apply it. In that case lignite coal, the particular commodity the rate for the transportation of which was attacked, stood in the same relation to the general business of the railroad as any other commodity and was therefore properly chargeable with a fair proportion of the general expenses of operation. It was not a special class of traffic, attracted by a special rate for a special service, bringing in additional revenue with little if any additional expense, which revenue would be lost in whole or in part by the abolition of the special rate.

Appellee contends that the order here attacked is a mere rate order, and not a service order. It is primarily a service order, and incidentally fixes a rate for that service. The service required is one continuous trip for one fare; the

rate-making portion of the order merely determines the amount of that single fare.

Appellee's own figures show little if any decrease in the cost per passenger, computed on its theory, after the injunction (Brief, p. 21), yet it still willingly carries a much larger number of two cent passengers than the injunction relieves it from carrying, and thus by its own practice admits in effect that the rate which it receives therefor is reasonable.

In the *North Dakota* case cited, one of the grounds of the Court's decision was that there was no practice of the carriers which supported a rate so low (236 U. S. at 597). Here Appellee's own practice, as well as the long established practice of street railroads in New York generally, supports it.

The *North Dakota* case also recognized the wide scope of legislative discretion in matters of classification and the impracticability of minute judicial scrutiny of every detail of a rate schedule. It is a fair inference of fact that transfer passengers, using the 59th Street Line as one link in a longer route, will usually ride for a shorter distance than passengers who make their entire journey upon that line. This of itself furnishes a sufficient basis for a reduced rate for such passengers.

The power of the rate-regulating authority, having jurisdiction, to fix joint rates for connecting carriers is well settled, and this Court has sustained a through rate so fixed at the same figure as the local rate of one of the carriers.

See *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136, 142.

V.

The Seven Cent Transfer Rate.

Appellee consistently ignores the fact that the order fixing this rate, which was suspended before it became operative, was made more than two years before the date down to which statistics of operation were furnished to the Master, and that any inferences which might otherwise be drawn from it are fully rebutted by the proved results of the actual experiment.

The grant of a seven cent rate for intra-company transfers to the New York Railways Company proves nothing in regard to the condition and needs of the Belt Line. The New York Railway Company was and still is in the hands of a Receiver; the Belt Line is not and has not been. The New York Railways Company is a great system extending all over the City, the Belt Line is one small link in certain special routes made necessary by the location of Central Park.

The decisions of this Court are clear that a rate does not become confiscatory the moment it ceases to be fully compensatory. Cases to this effect are cited in this Appellant's main Brief (pp. 25, 31). This distinction has been very recently recognized in the case of *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, at p. 396, where this Court pointed out that certain factors, such as past losses, good will and the like, are to be "considered in determining whether a rate charged by a public utility is reasonable," but are properly excluded in determining whether a legislative rate is confiscatory.

This Court has also said, by Mr. Justice Holmes:

> "We do not sit as a general appellate board of revision for all rates and taxes in the United States. We stop with considering whether it clearly appears that the Constitution of the United States has been infringed."
>
> *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 446.

A "general appellate board of revision" could and should consider whether rates are reasonable, adequate and compensatory. The Federal Courts are limited to considering whether they are confiscatory.

In granting the seven cent rate the Commission was exercising legislative powers, and could establish as a "reasonable" rate one far beyond the non-confiscatory limit. The question presented to the Court is simply whether the five-cent rate is below that limit. This "distinction between the judicial function of declaring a rate unreasonable, and the legislative function of establishing a rate as reasonable" has been repeatedly recognized by this Court.

> See *Det. & Mackinac Ry.* v. *Mich. R. R. Comm.*, 235 U. S. 402, 406, affirming 203 Fed. Rep. 804, 870; and cases cited.

VI.

Valuation.

The discussion of this question will be left to the Corporation Counsel, not because, as Appellee suggests, the Transit Commission is reluctant to deal with the testimony and estimates of Mr. Madden, prepared for a wholly different purpose and from a different point of view from that involved in this case, but because the Corporation Counsel is especially qualified by his experience to treat this complicated and technical subject, and it is assumed that this Court does not wish to be burdened with the reduplication of argument.

Conclusion.

This Reply has been limited to a brief mention of certain salient points in Appellee's Brief which appeared to call for special comment. The absence of discussion of Appellee's other arguments is not to be taken as admitting that they are either pertinent or valid. It is believed that they are sufficiently met in advance in the Main Brief, and that its conclusions remain unshaken.

Respectfully submitted this 9th day of March, 1925.

HOWARD THAYER KINGSBURY,
Special Counsel to Transit Commission.

GEORGE H. STOVER, Assistant Counsel,
Counsel for Appellant Transit Commission.

Eud.

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 465.

JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and TRANSIT COMMISSION, State of New York,

Appellants,

v.

BELT LINE RAILWAY CORPORATION,

Appellee.

BRIEF FOR APPELLEE, BELT LINE RAILWAY CORPORATION.

Neither of the opinions below—Judge Hough (R. p. 75) in denying the Transit Commission's motion to dismiss, and Judge Knox (R. p. 118) in granting the final decree—is reported.

The Belt Line Railway Corporation, appellee here, plaintiff below, is hereinafter referred to as the "Belt Line Company," and its predecessor, Central Park, North & East River Railroad Company, is hereinafter referred to as the "Central Park Company."

STATEMENT OF THE CASE.

The Appeal.

The decree appealed from (R. p. 120):

I. Confirms the finding and conclusion of the Master herein that so much of the order of the Public Service Commission of the State of New York for the First District, dated October 29th, 1912 (hereinafter referred to as the "order of October 29th, 1912") as required the Belt Line Company to exchange transfers for a single five-cent fare with the lines of the Second Avenue Railroad Company and the New York Railways Company at First Avenue, Second Avenue, Lexington Avenue, Sixth Avenue and Seventh Avenue is confiscatory;

II. Adjudges that the order of October 29th, 1912 is confiscatory and deprives the Belt Line Company of its property without due process of law, and is contrary to the Fourteenth Amendment to the Constitution of the United States in so far as it fixes at five cents the maximum joint rate, fare or charge to be exacted for through transportation over the lines of the Belt Line Company and the lines operated by all other street railway corporations mentioned in said order of October 29th, 1912, excepting the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, and in so far as it requires the Belt Line Company to maintain such through routes at such five-cent joint rate, and in so far as it requires Belt Line Company to deliver and receive transfers for the carrying out of said joint rate;

III. Adjudges the Belt Line Company has no remedy at law for the injury which will result from the enforcement of the order of October 29th, 1912;

IV. Enjoins the defendants from enforcing or attempting to enforce the provisions of the order of October 29th, 1912, excepting in so far as such order provides for joint rates, fares and charges between the lines of the Belt Line Company and the lines of the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company.

The order of October 29th, 1912 (R. p. 14), establishes through routes and joint rates, fares and charges between the 59th Street Crosstown Line of the plaintiff's predecessor, Central Park Company, operating in an east and west direction on 59th Street, and the intersecting lines of the New York Railways Company, the Second Avenue Railroad Company in the City of New York, the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, all operating in a north and south direction, and fixes the maximum joint rate, fare and charge for such through transportation at five cents, and requires such Railway Companies to make, within thirty days from and after December 1st, 1912, an agreement as to the proportion of each such five-cent joint rate to which each of them should be entitled.

The through routes so established by the Commission were not physically continuous through routes, but through routes which enabled a passenger by making a physical change from the car of one street railway company to the car of another independent street railway company, to ride on the lines of both such street railway companies for a single five-cent fare.

The statutory authority for the order of October 29th, 1912 and the authority upon which the Public Service

Commission relied in making that order (fol. 594, R. p. 378) was Subdivision 3 of §49 of Chapter 480 of the Laws of the State of New York of 1910, being the Public Service Commissions Law and constituting Chapter 48 of the Consolidated Laws, which reads as follows:

> "3. The commission shall have power by order to require any two or more common carriers, railroad corporations or street railroad corporations, whose lines, owned, operated, controlled or leased, form a continuous or connecting line of transportation or could be made to do so by the construction and maintenance of switch connection or interchange track at connecting points, or by transfer of property or passengers at connecting points, to establish through routes and joint rates, fares and charges for the transportation of passengers and property within the state as the commission may, by its order, designate; and in case such through routes and joint rates be not established by the common carriers, railroad corporations and street railroad corporations named in any such order within the time therein specified, the commission shall establish just and reasonable rates, fares and charges to be charged for such through transportation, and declare the portion thereof to which each common carrier, railroad corporation or street railroad corporation affected thereby shall be entitled and the manner in which the same shall be paid and secured; and the commission shall also have power in the same proceeding, or in a separate proceeding involving any rates, fares or charges, to prescribe joint rates and fares and charges as the maximum to be exacted

for the transportation by them of passengers and property within the state, and to require such common carriers, railroad corporations and street railroad corporations affected thereby to make within a specified time an agreement between them as to the portion of such joint rates, fares or charges to which each of them shall be entitled; and in case such agreement be not so made within the time so specified the Commission may declare by supplemental order the portion thereof to which each common carrier, railroad corporation or street railroad corporation affected thereby shall be entitled and the manner in which the same shall be paid and secured; such supplemental order shall take effect as part of the original order from the time such supplemental order shall become effective."

In October, 1919 and February, 1920, the Railroad Companies owning and operating the street railway lines on Madison Avenue, Eighth Avenue and Ninth Avenue, having taken over the operation of such lines on the surrender of the leases by the Receiver of the New York Railways Company, the through routes and joint rates between such lines and the lines of the Belt Line Company were discontinued and the Commission permitted the Belt Line Company to change its tariff schedules in conformity thereto (Exhibits K and L, R. pp. 302, 394, 395).

The following diagrams show the street railway lines over and between which joint rates and through routes were effective under the order of October 29th, 1912, (1) before the commencement of this action and (2) after

the preliminary injunction was granted herein on January 25th, 1921 (R. p. 70)—the injunction in the final decree is to the same effect—thus showing the result of the decree now appealed from:

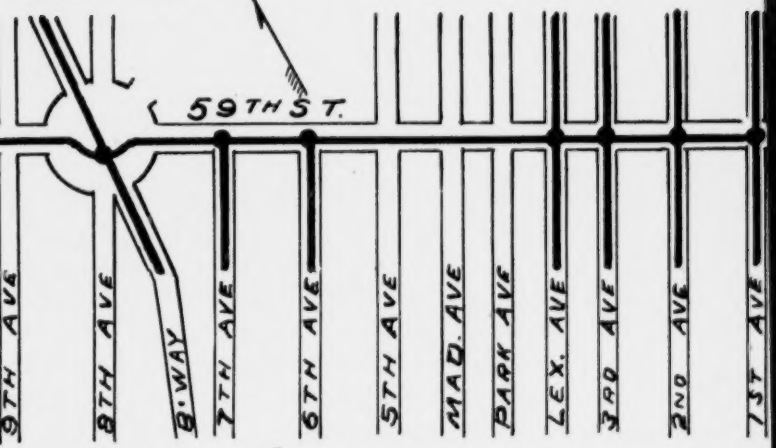
See Diagram opposite

The Attempts by the Belt Line Company and the New York Railways Company to be Relieved from the Order of October 29th, 1912.

The Receiver of the New York Railways Company applied, by petition dated May 11th, 1920, to the Public Service Commission to be relieved from the requirements of the order of October 29th, 1912 (Exhibit CH, R. pp. 393-399). The Belt Line Company, by petition to the Public Service Commission, verified May 18th, 1920, joined in the application of the Receiver of the New York Railways Company and prayed for a modification of the order of October 29th, 1912, so that the joint rate between the lines operated by the Belt Line Company and the lines operated by all the other street railway corporations named in the order of October 29th, 1912, excepting the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, should be discontinued (Exhibit BM, R. pp. 348, 351).

On May 22nd, 1920, the Belt Line Company filed with the Public Service Commission a revised tariff, eliminating the joint rates between its 59th Street line and the other lines named in the order of October 29th, 1912, excepting the lines of the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company. These revised tariffs by their terms were to become effective on June 22nd, 1920 (Exhibit BL, R. pp. 335-347).

BEFORE INJUNCTION



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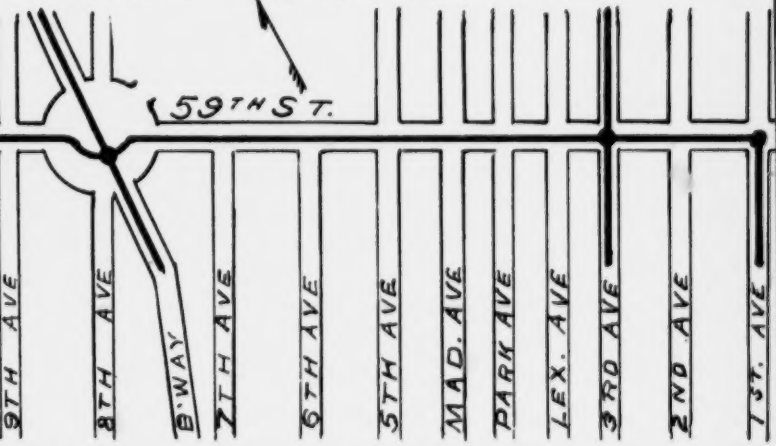

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On June 18th, 1920, the Public Service Commission, by its order dated June 18th, 1920, suspended the revised tariff schedules of the Belt Line Company and deferred the operation of such revised tariff schedules until July 22nd, 1920 (Exhibit Q, R. p. 304).

Thereafter hearings were held on the applications of the Receiver of the New York Railways Company and Belt Line Company to be relieved from the requirements of the order of October 29th, 1912 (R. p. 401), and on July 9th, 1920, *the Public Service Commission made an order* as a result of said applications and hearings *in which it held that*:

> "the maximum joint rate of five cents fixed in the said order of October 29th, 1912, is, by reason of the changed conditions under which the said railroad companies are operating, unjust, unreasonable and **insufficient to render a fair and reasonable return for the service furnished,** . . ."

and in which order it fixed a joint rate of seven cents instead of five cents, said change to become effective September 13th, 1920, and also *annulled the revised tariffs of the Belt Line Company hereinbefore referred to* (Exhibit R, same as Exhibit K, annexed to Bill of Complaint, R. pp. 48-49).

On July 23rd, 1920, the Belt Line Company applied for a re-hearing in the matter by an application (R. p. 402) in which it set forth that a joint rate of seven cents was confiscatory and that the evidence thus far submitted had no reference to a joint or through rate of seven cents.

The Public Service Commission never passed on the

application of the Belt Line Company for such re-hearing until November 4th, 1920 (three and one-half months after the application), on which date it made an order to which reference will presently be made.

On August 28th, 1920, the Receiver of the New York Railways Company also filed an application for a re-hearing (R. p. 403). On August 31st, 1920, the Public Service Commission granted the application of the Receiver of the New York Railways Company for a re-hearing and fixed the time for such re-hearing for November 5th, 1920 (Exhibit CM, R. p. 405). *This order of the Public Service Commission postponed indefinitely* (or as the order itself states: "until such date or dates as shall or may be fixed by the Commission at or after the determination of such re-hearing") *the time for the taking effect of the seven-cent joint rate and all other dates specified in its order of July 9th, 1920.*

The order of the Commission made November 4th, 1920, granting the application of the Belt Line Company for a re-hearing also *postponed indefinitely the time for the taking effect of the seven-cent joint rate and all other dates specified in its order of July 9th, 1920.*

Hearings were held on the re-hearing on November 5th and 10th, 1920, on which last mentioned date the matter was finally submitted to the Public Service Commission and the case was closed (Bill of Complaint, R. p. 10, Answer of Public Service Commission, R. p. 51, Answer of District Attorney, R. pp. 53-54).

Neither the Public Service Commission nor its successor, the Transit Commission, has ever made a determination upon such re-hearing. Thus the seven-cent joint rate mentioned in the order of July 9th, 1920 never became effective.

The Commencement of this Suit and the Injunction Pendente Lite.

This suit was commenced December 16th, 1920, and such proceedings were had that the Statutory Court, constituted as provided in §266 of the Judicial Code, and composed of Hon. Charles M. Hough, Circuit Judge, and Hons. Learned Hand and Julius M. Mayer, District Judges, on January 25th, 1921 granted the motion for an injunction *pendente lite* (R. p. 70) after rendering an opinion (R. p. 67) which is reported in 273 Fed. 272. In that opinion the Court made nineteen Findings of Fact and legal Conclusions therefrom.

The Trial.

The Transit Commission was substituted for the defendant, Public Service Commission, and on consent amended its Answer by alleging that the Belt Line Company is not entitled to complain of the order of October 29th, 1912 because it was incorporated subsequent and subject thereto, and then moved to dismiss the Bill of Complaint on the pleadings as amended, which motion was denied by Circuit Judge Hough (Opinion, R. p. 75), who referred the matter to the late Hon. E. Henry Lacombe, as Master, "to hear the allegations and proofs of the parties and report to this Court with all convenient speed the evidence taken by him together with his findings and conclusions thereon" (R. p. 78). These proceedings appear in the Record at pages 71-78.

The Proceedings Before the Master.

Hearings were held before the Master between October 17th, 1922 and February 14th, 1923, and the testimony taken at such hearings comprised 540 pages and 170 ex-

hibits, consisting of official records, statistical records and financial statements which were received in evidence.

The Report of the Special Master.

The Master made and filed his report dated May 25th, 1923 (R. pp. 78-100), in which he found (R. p. 109):

> "So much of the order of the Commission of October 29th, 1912, as requires complainant to exchange transfers, for a single 5-cent fare with the lines of the Second Avenue R. R. Co., and the New York Railways Co. at First Avenue, Second Avenue, Lexington Avenue, Sixth Avenue and Seventh Avenue is confiscatory."

The Decision and Opinion of the District Court.

The District Judge, in confirming the Master's conclusion that the joint rate, if enforced, would continue to be confiscatory, bases his conclusion (R. p. 118) upon both the "out-of-pocket cost" theory which the appellants erroneously, as we believe, contend is the only basis upon which this case is to be considered, and also upon the ground that the cost to the Belt Line Company of carrying each passenger far exceeded the two cents which was the limit which the Belt Line Company received for carrying the joint rate passengers under the order of October 29th, 1912. In other words, there can be no difference between the service afforded a joint rate passenger and the service afforded to other passengers, and that therefore, since the proof conclusively showed that the cost of carrying each passenger far exceeded the two cents, which was the limit which the Belt Line Company received for carrying the joint rate passengers, the order of October 29th, 1912, is confiscatory.

The District Judge also approved the Master's finding of the valuation of $2,600,000 to be accorded to Belt Line Company's property for the purpose of calculating a reasonable return, and in concluding his opinion, gave the following additional significant reason for finding that the order of October 29th, 1912 is confiscatory (R. p. 120):

> "But aside from the particular theory to be employed in determining whether the Public Service Commission order of October 29, 1912 is confiscatory, the case presents the unusual and most persuasive circumstance that the Commission itself upon June 9, 1920 entered its order to the effect that the joint rate of five cents fixed by the order of October 29, 1912, had through changed conditions, become 'unjust, unreasonable and insufficient to render a fair and reasonable return for the service furnished * * *.' To my mind, this conclusion, notwithstanding the argument of defendants' counsel to the contrary, is the equivalent of a declaration by the predecessor of one of the defendants that the joint rate of five cents was confiscatory. The evidence satisfies me that the joint rate, if enforced, would continue to be confiscatory. The Master's conclusion to the same effect will be confirmed."

THE FACTS.

The appellant, Transit Commission, makes the following statement in its brief (p. 3):

> "There is little or no conflict of testimony in this case. The controversy upon the facts arises from the different inferences and conclusions to be

drawn from testimony and statistics which are substantially undisputed. * * *"

The Franchise and Incorporation of Belt Line Company.

The franchise of the Belt Line Company was granted directly to certain individuals by the Legislature of the State of New York by Chapter 511 of the Laws of 1860. This statutory franchise covered 59th Street from First Avenue to Tenth Avenue, also First Avenue and Tenth Avenue south of 59th Street, and other streets therein named, ~~and contained the following provision:~~

After the passage of the above Act (June 5th, 1860) the individuals named in the above mentioned statute incorporated the Central Park, North & East River Railroad Company (hereinafter referred to as the Central Park Company) for the purpose of constructing the street railroad referred to in that Act (C. 511, L. 1860) (Exhibit G, R. pp. 289-291). Thereafter, on December 28th, 1861, the municipal authorities of the City of New York granted to the Central Park Company permission for the construction and operation of the street railroad referred to in the aforesaid Act (Exhibit E, R. pp. 283-285).

When the order of October 29th, 1912 was made, the Central Park Company was operating the street surface railroad on 59th Street and on the other steets named in the statutory franchise above mentioned.

In the years 1911 and 1912, the Central Park Company was reorganized by a sale of its corporate property and franchises under a decree of foreclosure and sale made by the United States Circuit Court for the Southern District of New York, upon which sale the property and franchises of the Central Park Company were sold to Edward Cornell for $1,673,000 (Exhibit B, R. pp. 264-

269) who, as such purchaser, immediately (December 21st, 1912) under and pursuant to then §9 of the Stock Corporation Law of New York, entitled "§9. Re-organization upon Sale of Corporate Property and Franchises" (a copy of which is hereto annexed and marked "Appendix A"), made and filed the Certificate which reorganized the Central Park Company into the Belt Line Company (Exhibit F, R. pp. 286, 288).

For further emphasis, however, we quote here the following from such statute:

> "Such corporation shall be vested with, and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation last owning the property sold, or its Receiver and shall be subject to all the provisions, duties and liabilities imposed by law on that corporation."

The property was vested in the Belt Line Railway Corporation by a deed from Edward Cornell dated January 21, 1913 (Exhibit D, R. pp. 279, 282).

Valuation of Property of Belt Line Company.

In the proof presented by the Belt Line Company showing that the joint rate order of October 29th, 1912, was confiscatory, the Belt Line Company only deducted interest charged at five per cent. (5%) on the actual amount of its indebtedness, to wit: $1,823,091.53 (First Mortgage $1,750,000; Note $73,091.53). To show justification for this charge of interest at five per cent. (5%) on this amount, the Belt Line Company proved valuation of its property to be far in excess of the amount of its First Mortgage and Note Indebtedness.

Before setting forth the evidence on the question of

valuation, it is important to note that at the time the Belt Line Company was reorganized from the Central Park Company and its bonds and stock were issued, the Public Service Commissions Law was in full force and effect and under that law no bonds or capital stock could be issued nor indebtedness created without the express consent and authorization of the Public Service Commission. The Public Service Commission (the predecessor of the Transit Commission) by four different orders authorized the Belt Line Company to issue and sell its capital stock, mortgage bonds and note, as follows (Exhibits M, N, O and P, R. p. 303, same as Exhibits B, C, D and E annexed to Complaint, R. pp. 26-39):

Capital stock	$ 734,000.00
This Capital Stock was issued pursuant to three orders of the Public Service Commission, of which the present Transit Commission is the successor:	
Order dated March 19, 1913, Case 1606 (Exhibit M),	
Order dated July 22, 1913, Case 1703 (Exhibit N),	
Order dated November 7, 1913, Case 1723 (Exhibit O),	
First Mortgage Five Per Cent. Bonds ..	1,750,000.00
authorized to be issued by Public Service Commission by order dated March 19, 1913, Case 1606 (Exhibit M),	
Note	73,091.53
authorized by Public Service Commission by order dated October 8, 1915, Case 1778 (Exhibit P).	
Total	$2,557,091.53

The stock, bonds and note thus expressly authorized by the Public Service Commission were issued and sold, and the money actually used not only to pay such purchase price but also to pay for additions and improvements to the Belt Line Company (Exhibits CO and CP, R. p. 406).

The Master, as we have stated, found the value of the Belt Line Company's property to be $2,600,000 and such finding was fully supported by the evidence.

Coming then, to the evidence concerning the valuation of the Belt Line Company's property, there was, in the words of the appellant, Transit Commission, "no conflict of testimony."

There was no conflict of testimony on the question of valuation because no witnesses were called by the appellants to prove valuations and for the additional reason that the witnesses who testified concerning the valuation of the Belt Line Company's property, and whose valuations the Master accepted, were Mr. John H. Madden, who, at the time he testified, was in the employ of the Transit Commission, and at that time and for some time previous thereto, had been charged with the duty of valuing street railway properties in the City of New York, including the property of the Belt Line Company, and also Mr. Irving Ruland, who had been employed by the Transit Commission to value the land of the Belt Line Company. It may be that this is the reason why counsel for the Transit Commission saw fit to delegate to the Corporation Counsel, as his only contribution on this appeal, the task of discussing Mr. Madden's valuation and the returns thereon.

Mr. Madden testified (R. p. 157) that the cost to reproduce plaintiff's property, exclusive of land, as of June

30th, 1921, was $2,859,754, and that the land was appraised by Mr. Irving Ruland, the appraiser for the Transit Commission, at $531,000. The Belt Line Company also called Mr. Ruland, who testified that the land of the Belt Line Company was of the value of $531,000 (R. p. 212).

Mr. Madden later revised his figure of $2,859,754 by deducting therefrom for change of inventory, the sum of $77,000, thus making the revised cost to reproduce $2,778,754.

Mr. Madden then brought his cost to reproduce the property down to the date of the time he was testifying (November, 1922) by stating that such cost would at that time be 10% less than his figure of $2,778,754, thus making the cost to reproduce the Belt Line Company's property, exclusive of land, at the sum of $2,504,468.60 (R. pp. 163-164). Mr. Madden has testified that his estimate of depreciation was $128,246 (R. p. 164).

The above are the only figures which Mr. Madden and Mr. Ruland testified to, and with the exception of figures given by other witnesses called by the Belt Line Company concerning the cost to reproduce certain parts of the Belt Line Company's property, they are the only valuations in the case.

Summarized, these valuations are as follows:

Mr. Madden—cost to reproduce exclusive of land as of the time he testified (November, 1922)	$2,504,478.60
Mr. Ruland—valuation of land	531,000.
Total	$3,035,478.60
Less depreciation	128,246.
Cost to reproduce new, less depreciation	$2,907,232.60

The Master found the value of the Belt Line Company's property to be $2,600,000 and the District Judge states (R. p. 119):

> "This finding, I believe, was justified by the evidence and I shall not disturb it."

As shown by the uncontradicted evidence of Mr. Madden and Mr. Ruland, both of whom were employed by the Transit Commission to value the same properties, the valuation of $2,600,000 as found by the Master was far below what it should have been.

It is important to note in connection with the above valuation that in the financial statements and exhibits which the Belt Line Company introduced in evidence to show the confiscatory nature of the joint rate order of October 29, 1912, an interest charge of only 5% on $1,823,-091.53 (the amount of the first mortgage—$1,750,000—plus the amount of the note—$73,091.53) was deducted; whereas, if instead there had been deducted a return of at least 6% on the valuation of $2,600,000 the cost of operation and the cost of carrying each passenger would be greater than actually shown on such statements and exhibits, and accordingly the deficits from operation would be greater than shown thereon.

The Public Service Commission's recognition that conditions had so changed as to make the five cent joint rate established by the order of October 29, 1912, confiscatory.

Since the making of the order of October 29, 1912, the prices of labor and material advanced from 75% to 100% over what they were in 1913. This was proven by the Belt Line Company's Exhibit BQ (R. p. 358), and no at-

tempt was made to dispute it. From this it follows, of course, that the purchasing powers of the two cents which the Belt Line Company was receiving under the order of October 29, 1912, was reduced by one-half.

The Public Service Commission recognized this increase in the cost of labor and materials and the decrease in the purchasing power of money as the same affected joint rates and transfer privileges as evidenced by its acts as follows:

1. On July 15, 1919 the Public Service Commission authorized the New York Railways Company to charge two cents for transfers *from and to cars operated solely by it* thus making the fare when a transfer was given and received seven cents, all of which seven cents was and is retained by the one company, the New York Railways Company (Exhibit CH, R. p. 393).

This additional charge of two cents for a transfer between the cars of the New York Railways Company is still in force notwithstanding the Transit Commission has the power to change it.

2. On October 24, 1919 and February 27, 1920, the Belt Line Company was permitted by the Public Service Commission to at once put into effect new tariff schedules whereby the joint rate between its 59th Street crosstown line and the Eighth and Ninth Avenue north and south lines and the Madison Avenue north and south line, was eliminated from the order of October 29, 1912 and the joint rate of five cents was no longer in effect on those lines (Exhibits K and L, R. p. 302).

3. The third act by which the Public Service

Commission has recognized that the order of October 29, 1912 was confiscatory by reason of changed conditions is its finding to that effect in its order of July 9, 1920 (Exhibit K annexed to Bill of Complaint, R. p. 302, which was Exhibit R before the Master, R. p. 305). In that order of July 9, 1920, made in a proceeding instituted by the Belt Line Company and the New York Railways Company to be relieved of the joint rate now in question, the Public Service Commission found

"* * * that the maximum joint rate of five cents fixed in the said order of October 29, 1912, is, by reason of the changed conditions under which the Railroad Companies are operating, unjust, unreasonable, and *insufficient to render a fair and reasonable return for the service furnished.*"

The proof showing that the five cent joint rate xed by the order of October 29, 1912, was con- catory.

Here again, in the language of the counsel for the ansit Commission, there is "no conflict of testimony." The interlocutory injunction whereby the Belt Line ompany was relieved from the five cent joint rate now in estion and under which it was receiving only two cents om each joint rate passenger was put into effect on Feb- ary 1st, 1921. The proof, therefore, naturally divides elf into two periods: (1) before the interlocutory in- nction and (2) after such injunction.

The results of operation before the interlocutory injunction.

The results of operation from March 2, 1913, the date of the beginning of the operation of the Belt Line Company, until October 31, 1920—the latest date to which the financial statements could be compiled at the time of the filing of the Bill of Complaint—are set forth in Exhibit J attached to the Bill of Complaint (R. p. 46) which was received in evidence before the Master as Exhibit Y (R. p. 137). This exhibit shows that after deducting a return of only 5% on the actual amount of the indebtedness, $1,823,091.53, and without making any allowance for depreciation, the Belt Line Company operated at a deficit in the years ending June 30, 1917, 1918 and 1920 and the four months ending October 31, 1920. In the year ending June 30, 1919, there was only $7,159.11 to be applied toward depreciation and a full return on the value of the Belt Line Company's property.

Exhibit Y (Exhibit J annexed to the complaint) also shows that on October 31, 1920 the accumulated deficits of the Belt Line Company were $201,270.13.

One of the causes of these deficits is shown by Exhibits F, G, H and I annexed to the complaint (R. pp. 40-46) which were Exhibits U, V, W and X before the Master (R. p. 306). These exhibits show that the total number of passengers carried at five cents and at two cents (the two cent passengers being the joint rate passengers) and the cost per passenger were as follows:

Year ended June 30th	Passengers at 5c each	Passengers at 2c, being joint rate passengers	Cost per passenger including operating expenses and taxes but not including depreciation and interest charges	Cost per passenger exclusive of depreciation but including interest at 5% on $1,823,091.53
1918	6,450,687	13,512,033	2.75c	3.20c
1919	5,440,766	12,817,674	2.49c	3.00c
1920	7,186,735	10,171,479	2.93c	3.46c
4 months ended October 31, 1920	2,402,202	3,077,007	3.40c	3.96c

The proof is therefore conclusive that the 2 cents which the Belt Line Company was receiving from each joint rate passenger was far less than even the actual operating expenses of transporting such passenger, without considering at all any depreciation nor any return whatsoever on its property.

The results of operation after the interlocutory injunction.

Exhibits BE, BF and BG (R. pp. 330-334) show as follows:

Year ended June 30th	Passengers at 5c each	Passengers at 2c, being joint rate passengers	Cost per passenger including operating expenses and taxes but not including depreciation and interest charges	Cost per passenger exclusive of depreciation but including interest at 5% on $1,823,091.53
*1921	8,119,325	7,948,148	3.52c	4.10c
1922	8,100,009	5,720,102	2.92c	3.58c
3 months ended September 30, 1922	1,690,229	1,426,923	3.03c	3.77c

* Only five months of this year ended June 30, 1921, were after the injunction.

The results of operations in the above periods after the injunction were as follows:

Year ended June 30, 1921.

Only five months of this year were after the injunction. For this year there was a deficit of $56,344.44 after deducting an interest charge of only 5% on the amount of the indebtedness ($1,823,091.53) and without making any allowance for depreciation.

Year ended June 30, 1922.

In this year, after deducting only 5% on the amount of the indebtedness ($1,823,091.53) and without allowing anything for depreciation, there was available for depreciation and for a balance of full return on the value of the property, $65,665.41. Exhibit BH (R. p. 336) shows that the depreciation for that year was $47,192.55, which would leave $18,472.86 for the balance of the full return. The amount necessary to make an additional 1% on the amount of indebtedness and a return of 6% on the value of the property over and above the amount of the indebtedness is $64,844, thus making an actual deficit of $46,372 for the year ended June 30, 1922, after including depreciation and a return on the value of the property.

Three months ended September 30, 1922.

Exhibit BG (R. p. 334) shows that for these three months, after deducting only 5% on the amount of the indebtedness ($1,823,091.53), without making any allowance for depreciation, there was available for depreciation and for return on the value of the property $4,098.77. The amount charged for depreciation for these three

months is $11,111.49 (Exhibit BH, R. p. 336) leaving an actual deficit of $7,012.72. If there is also deducted the amount necessary to make up the full return of 6% on the value of the property, this deficit for these three months is increased by $16,211, making a total deficit of $23,223 for these three months.

Twenty months period after the injunction (February 1, 1921, to September 30, 1922).

Exhibit BC (R. p. 326) shows that the result of the operations for these twenty months was a balance of $48,583.29 available for depreciation and a full return on the balance of the $2,600,000 property investment, not included in the $1,823,091.53, on which 5% had been deducted for that period. If this additional return on the balance of the property valuation is computed for the twenty months covered by this exhibit, there is a deficit of $59,492.46, without making any allowance whatever for depreciation. This is shown by the following computation:

Additional return at 1% on $1,823,091 for 20 months	$30,384.85
6% on $776,909 ($2,600,000 minus $1,823,091 equals 776,909) for 20 mos.	77,690.90
Total	$108,075.75
Deducting balance as shown by Exhibit BC (R. p. 326) available for depreciation and return on capital	48,583.29
Deficit for return on capital	$59,492.46

If to the above deficit depreciation were added, the deficit would, as stated above, be even greater.

From the above statements it appears—and in fact is undisputed—that even in the period after the injunction, when the Company had been relieved from carrying the joint rate passengers from whom it received only two cents, the earnings of the Belt Line Company were $59,492.46 less than the amount required to pay return of 6% on the $2,600,000, and this deficit would be increased by the amount necessary to be set aside for depreciation.

Furthermore, on September 30, 1922, the total accumulated deficit was $436,248.40 (R. p. 337).

Comparison of the Number of Passengers Carried Before and After the Cutting Off of Joint Rate by Interlocutory Injunction.

During the year ended June 30th, 1920 (the last fiscal year prior to the cutting off of the joint rate under the injunction herein), the revenue passengers carried were as follows (R. p. 44):

7,186,735	passengers at 5c each
10,171,479	" " 2c "
531,876	free transfer passengers (not covered by joint rate)
17,890,090	Total passengers

During the year ended June 30th, 1922 (the first fiscal year after the cutting off of the joint rate under the injunction order herein), the revenue passengers carried were as follows (R. p. 332):

8,100,009	passengers	at	5c	each	
3,308,658	"	"	2c	"	(Third Avenue)
2,411,444	"	"	2c	"	(42nd Street)
418,988	free transfer passengers (not covered by joint rate)				
14,239,099	Total passengers				

Thus the Belt Line Company carried 3,650,991 less passengers in the year after the injunction—when the joint rate covered by the injunction in this case was not in effect—than in a corresponding year before the injunction under the joint rate order.

In other words, there was a reduction of 10,000 passengers per day carried by the Belt Line Company on its 59th Street Crosstown Line by reason of the injunction and consequent cutting off of the joint rate between the lines of the Belt Line Company and the lines of the New York Railways Company and the Second Avenue Railroad Company. The Belt Line Company carried in the year ended June 30th, 1922, 20.4% less passengers than in the year ended June 30th, 1920; if the comparison is reversed, and if the Company during the year ended June 30th, 1922, had carried the same number of passengers as in the year ended June 30th, 1920, the increase would have been 25%.

A comparison between the period from February 1, 1919 to September 30th, 1920, which was entirely before the injunction, and the period from February 1st, 1921 to September 30th, 1922, which was entirely after the injunction, shows that in the twenty months prior to the injunction (February 1, 1919 to September 30, 1920) the Belt Line Company carried on its 59th Street Line 28,623,060 passengers (Exhibit BD, R. p. 328), and in the twenty

months after the injunction (February 1, 1921 to September 30, 1922) it carried on its 59th Street line 23,550,706 passengers, a difference of 5,072,354, or a difference of 8453 passengers per day. In terms of percentages, the Belt Line Company carried 17.7% less passengers in the twenty months after the injunction (February 1, 1921 to September 30, 1922) than in the twenty months prior to the injunction (February 1, 1919 to September 30, 1920), and if the Belt Line Company had carried as many passengers in the twenty months after the injunction (February 1, 1921 to September 30, 1922) as it carried in the twenty months prior to the injunction (February 1, 1919 to September 30, 1920), the increase would have been 21.5%.

Likewise, there is no dispute concerning what the effect would have been had the Company been required to carry in the period after the injunction 20% to 25% more passengers than it did carry in that period.

The Elimination of Joint Rate Passengers from each of whom the Belt Line Company would have Received Only Two Cents, Saved the Belt Line Company from the Operation of Additional Car Mileage and from Additional Expense.

Here again there is "no conflict of testimony."

It is undisputed that at the time the injunction was granted—January, 1921,—travel on the Belt Line Company's 59th Street Crosstown Line had reached the point where, if it still continued to carry the number of passengers it was then, and had been prior thereto, carrying, it would have had to materially increase its car mileage, which is equivalent to saying increasing its expense.

This fact is shown not only by the testimony of Mr.

William E. Thompson, the Superintendent of Transportation of the Belt Line Company, but also by the written demands of the Public Service Commission itself. Mr. Thompson testified (R. p. 141) that prior to January 31st, 1921 (the interlocutory injunction went into effect February 1st) the condition of street railway travel on 59th Street was badly overcrowded and in his opinion had reached the point where more cars were necessary to furnish adequate service for the travel which was offering.

The following are instances of the written demands made by the Public Service Commission on the Belt Line Company to increase the number of cars—and this would mean an increase in car mileage.

1. Exhibit XA (R. p. 307) shows that prior to November 13th, 1919, the Public Service Commission had been insisting upon more cars on the 59th Street Crosstown Line, and that on that date the Commission again referred to the "enormous overloading" and directed the Belt Line Company to advise the Commission "what action you will take in the matter."

2. That the discontinuance of the joint rate between the Belt Line Company and the New York Railways Company and the Second Avenue Railroad Company would relieve the Belt Line Company from increasing its car mileage as demanded by the Public Service Commission, is shown by the first paragraph of Exhibit YA (R. p. 308), which is a letter from the Public Service Commission to the President of the Belt Line Company. In this letter, however, the Commission calls attention to the fact that such joint rate is still in effect (not-

withstanding the petition of the New York Railways to the Federal Court for the right to discontinue such joint rate), and refers to its demand for an increase in car mileage under date of November 13th, 1919 (Exhibit XA, R. p. 307), and after stating that the overloading is excessive, flatly requires the Company "to increase the service during both the morning and rush hours."

3. Exhibit Z (R. p. 311) which is a letter from the Public Service Commission to the President of the Belt Line Company, dated April 5, 1920, again requires the Company to increase the service.

4. Exhibit BA (R. p. 314) is a letter from the Public Service Commission to the President of the Belt Line Company, dated November 12th, 1920, again referring to "excessive overloading" on the 59th Street Crosstown Line, and requires the Company to "immediately" operate sufficient additional cars to provide a number of seats equal to the number of passengers carried in both non-rush hour and rush hour periods.

5. Exhibit BB (R. p. 321) is a letter from the Public Service Commission to the President of the Belt Line Company, dated November 16th, 1920, in which the Commission states that the Belt Line Company is giving "inadequate service" on the 59th Street Crosstown Line, and requires the Belt Line Company to operate additional cars.

It should be noted that the requirements for increase in car mileage made by the Commission in its letters of November 12th and November 16th, 1920 (Exhibits BA

and BB) were at the very time when the Commission had pending before it the Belt Line Company's application for relief from the joint rate order of October 29th, 1912.

The above demands of the Public Service Commission were referred to by the learned District Judge in his opinion, as follows (R. p. 118):

> "That the cars in service, prior to the issuance of the injunction, were 'enormously overcrowded' is established by the letters of the Public Service Commission calling attention thereto."

That the Belt Line Company was, by the interlocutory injunction cutting off the joint rate, saved from increasing its car mileage as demanded by the Public Service Commission, is shown by the undisputed fact that the number of passengers carried after the injunction was from 8,000 to 10,000 less per day—a reduction of 17% to 20%. The Belt Line Company would have had to substantially increase its operating expenses if it had continued to carry the joint rate passengers, and the fact that if the Company were again required to carry all joint rate passengers, its operating expenses must be substantially increased, was undisputably proven not only by the testimony of its own witnesses but by the testimony of the Transit Commission's own witness.

Mr. Thompson, the Superintendent of Transportation of the Belt Line Company, testified that during the twenty months period after the injunction (February 1st, 1921 to September 30th, 1922), the cars operated by the Belt Line Company on 59th Street could not have carried an appreciable number of additional passengers, and that any increase in the number of passengers would have required the addition of cars in the same proportion.

In other words, he testified that the car mileage would increase in the same proportion that the street car travel increased (R. p. 166).

This testimony stands undisputed in the Record.

Mr. Farrington, the Auditor of the Belt Line Company, testified that on the average the expenses increase in the same proportion as the mileage increases (R. p. 171).

This testimony is also undisputed in the Record.

Mr. William O. Smith, the Supervising Transit Inspector of the Transit Commission, one of the appellants here, after testifying to an experience of over fifteen years in the service of the Transit Commission and its predecessors in office (R. p. 255), testified that **even at the present time** (January 25, 1923) **with the millions of joint rate passengers eliminated** (8,000 to 10,000 passengers less per day), **the service on 59th Street should be increased 10%** (R. pp. 249, 250).

From this testimony of the Transit Commission's own Supervising Transit Inspector, given on direct examination by the counsel for the appellant here, Transit Commission, it follows that if the *present* service, when the joint rate complained of is not required, is insufficient for the *present* needs and requires 10% more car mileage, then surely if the millions of joint rate passengers were added to the number carried on 59th Street (based on years prior to the injunction, the increase would be from 20% to 25%), there would, in the period subsequent to the injunction, have been substantial increases in the operating expenses of the Belt Line Company.

Concerning this the District Judge stated (R. p. 118):

> "If the transfer passengers should again be carried, the service would be as bad as before, unless

there should also be a substantial increase in plaintiff's car mileage. The character of service to be rendered by a public service utility is not, as such, a matter which concerns this Court. But even so, the facts, as the evidence shows them to be, cannot be overlooked, and reasonable inferences are to be drawn. One of such (fol. 196) facts is, that even now, with the injunction as to the five cent transfer order in effect, there should be an increase of ten per cent. in plaintiff's car mileage. If five to six thousand more transfer passengers per day are to be added to the total number of persons now being carried, it is plain as a pikestaff that plaintiff must necessarily increase its expenses by a very considerable amount."

Just how much worse off the Company would have been during the post-injunction period if the injunction had not been granted and if the Belt Line Company was required to carry the joint rate passengers at two cents each, is conclusively shown by Exhibit BP (R. p. 256).

This Exhibit BP shows the income from operation for the 20 months after the injunction (Feb. 1, 1921 to September 30, 1922), during which the joint rate involved in this case was not in effect, adjusted to what it would have been if the same number of five-cent and two-cent passengers had been carried during that period as were actually carried during the 20 months previous to the injunction (Feb. 1, 1919 to September 30, 1920) during which the joint rate herein complained of was in effect.

As shown by that Exhibit BP, the Belt Line Company carried over 5,000,000 less passengers in the 20 months after the injunction than during the corresponding 20

months prior to the injunction. In other words, if the Company had, during the 20 months after the injunction, carried the same number of passengers as it did in the 20 months prior to the injunction the increase would have been 21½%.

It is undisputed in this case that the operating expenses increase in the same proportion as the number of passengers increase.

This Exhibit BP shows that for the 20 months after the injunction there was available for depreciation and for return on the balance of the capital stock over and above the funded indebtedness $48,583.29. This is the same figure as is shown on Exhibit BC (R. pp. 326-327).

As we have previously shown, if this sum of $48,583.29 were applied to make up a 6% return on $2,600,000, there would have been a deficit for the operation for this period of $59,492.46 without making any allowance for depreciation. In other words, even before there is any attempt to re-adjust the results of operation during the 20 months after the injunction on the basis of what they would have been if the Company had been required to carry additional passengers at two cents and thus incurred additional expense, there was an actual loss of over $59,000, which must be increased by the amount necessary to make up depreciation.

Exhibit BP, however, shows that on the basis of what the Company would have received and paid out if it had been required to carry the same number of passengers as it did carry during the corresponding period prior to the injunction, there would have been a loss, even on the basis of only a 5% return on the amount of the indebtedness ($1,823,091.53) of $115,424.59 (Record Insert p. 356).

If, however, a return of 6% on $2,600,000, to which the

Belt Line Company is entitled, were to be taken in place of only 5% interest on only $1,823,091.53, there would be an actual deficit of $217,755.55, and without any allowance for depreciation. This deficit of $217,755.55 is arrived at as follows:

	Adjusted Income per Ex. BP		Adjusted income Substituting 6% on $2,600,000 in place of Bond and Note Interest
Revenue	$ 950,764.28		$ 950,764.28
Oper. Exp. & Taxes	908,519.83		908,519.83
Interest on bonds.	145,833.34	6% on $2,600,000 for 20 Mos.	260,000.00
Interest on Notes.	6,974.70		
Amortization of Bond Discount..	4,861.00		
Total Deduction ..	$1,066,188.87		$1,168,519.83
Net Adjusted Loss.	$ 115,424.59		$ 217,755.55

If Exhibit BP were reconstructed on the basis of the same number of passengers as were carried in the corresponding 20 months prior to the injunction (an increase of 21%) and on the basis of only 10½% increase in the expenses, there would have been a loss of $36,586.09, and if an amount necessary to make up a full return of 6% on $2,600,000 is included in the calculation, the loss, on the basis of only 10½% increase in expenses, would have been $138,917.05. The following tables show this calculation:

Operating expenses shown on Exhibit BP...	$750,842.84
An increase of 10½% would be.....	78,838.49
Operating expenses adjusted as above..	$829,681.33
Interest on 1st Mortgage 5% Bonds.....	145,833.34
Interest on notes payable at 5%.....	6,974.70
Amortization of Bond Discount.....	4,861.00
Total	$987,350.37
Amount of adjusted income.....	950,764.28
Loss	$ 36,586.09

	Adjusted income per Ex. BP.		Adjusted income on basis of 10½% increase in operating expenses instead of 21% increase used on Exhibit BP
Revenue	$ 950,764.28		$ 950,764.28
Oper. Exp. & Taxes	908,519.83		829,681.33
Interest on Bonds.	145,833.34	6% on $2,600,000 for 20 Mos.	260,000.00
Interest on Notes.	6,974.70		
Amortization of Bond Discount..	4,861.00		
Total Deduction...	$1,066,188.87		$1,089,681.33
Net Adjusted Loss.	$ 115,424.59		$ 138,917.05

BRIEF OF THE ARGUMENT.

1. The Belt Line Company properly invoked the jurisdiction of the District Court.

2. The order of October 29th, 1912, was not a service order or requirement.

3. The Joint Rate Order of October 29th, 1912, is confiscatory.

4. The Belt Line Company is entitled to complain of the joint rate order of October 29th, 1912, as an infringement of its constitutional right.

5. There has been no action or conduct on the part of the Belt Line Company which gives any foundation whatever for the Appellants' claim that it is not entitled to equitable relief.

6. The District Court did not find, as claimed by Appellant Banton in his brief, that there was only a loss of $4,000 per annum on the joint rate traffic cut off by the injunction herein.

7. The Appellant Banton's argument in his Point II that the Belt Line Company would, if it resumed the joint rate traffic, earn a fair return on the property is contrary to the evidence herein.

8. The valuation of the Belt Line Company's property found by the Master and approved by the District Court was justified by the evidence.

POINT I.

The Belt Line Company properly invoked the jurisdiction of the District Court.

This point is in answer to Point IV in the brief of the appellant, Transit Commission, in which it is contended

(1) That the rate-making process was not completed because the case before the Public Service Commission had not been finally submitted on the rehearing before the Commission, and

(2) That the rate-making process had not even been initiated because of the agreement between the carriers involved for the division of the rate under which the Belt Line Company received two cents as its share of the five-cent joint rate.

(1)

The contention that the rate-making process had not been completed because the rehearing before the Public Service Commission had not been finally closed or the matter had not been "finally submitted" on such rehearing, is summarily disposed of by the decision of this Court in *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, in which this Court held (p. 48, italics ours):

> "*It was not necessary that the company should apply to the Commission for a rehearing before resorting to the Court.* While under the Public Service Commission Law any person interested in an order of the Commission has the right to apply for a rehearing, the Commission is not required to grant such rehearing unless in its judgment sufficient reason therefor appear; the application for the rehearing does not excuse compliance with the order or its enforcement except as the Commission may direct, and any change made in the original order upon the rehearing does not affect the enforcement of any right arising from the original order (§22) as the law does not require an application for a rehearing to be made and its granting is entirely within the discretion of the Commission,

we see no reason for requiring it to be made as a *condition precedent to the bringing of a suit to enjoin the enforcement of the order.* See, by analogy, *Hollis* v. *Kutz*, 255 U. S., 452, 454; *Re Arkansas Rate Cases* (C. C.), 187 Fed. 290, 306; *Atlantic Coast Line* v. *Interstate Commission* (Com. Ct.), 194 Fed. 449, 452; *Baltimore Railroad* v. *Railroad Commission* (C. C.), 196 Fed. 690, 693, 699; and *Chicago Railways* v. *Illinois Commission* (D. C.), 277 Fed. 970, 974. In *Palermo Water Co.* v. *Railroad Commission* (D. C.), 227 Fed. 708, the statute specfically provided that no cause of action should accrue in any court out of any order of the Commission unless an application for a rehearing had been made. Here the Commission did not suggest in its answer that it perceived any ground upon which it would have granted a rehearing, if an application had been made, but, on the contrary, maintained the correctness of its orders in all respects. *Manifestly under such circumstances the injunction should not have been denied merely because application had not been made to the Commission for a rehearing.*"

To the same effect also is the decision of this Court in *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, wherein Mr. Justice Brandeis states (p. 282):

> "Despite the failure to apply for a rehearing, the Court had jurisdiction to entertain this suit. *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 48, 49. Compare *Chicago Rys. Co.* v. *Illinois Commerce Commission*, 277 Fed. 970, 974."

The decision in the *Prendergast* case was based upon the same §22 of the Public Service Commission Law which

the appellant, Transit Commission, quotes at page 43 of its brief, and is the same section which brings about the same situation in this case.

If it was not necessary to even apply for a rehearing before applying to the Federal Court for relief, certainly it is not necessary to even consider the claim of the appellants that the matter had never been "finally submitted" to the Public Service Commission on the rehearing.

The contention of defendants that the matter was not "finally submitted" on rehearing, is not supported by the facts and is a pure afterthought.

While no discussion of this is necessary, in view of the decision of this Court in *Prendergast* v. *New York Telephone Co.* (*supra*), we believe the Court should know that the Public Service Commission (the predecessor of the Transit Commission) has expressly and squarely admitted that the matter was "finally submitted" to it on the rehearing.

The complaint in this case expressly alleges (subd. XII, fol. 16, R. p. 10, italics ours):

> "* * * and on the 10th day of November the matter was *finally submitted* to the Public Service Commission of the State of New York for the First District, and the case was closed.
>
> "The Public Service Commission of the State of New York for the First District has refused and neglected for more than thirty days to determine the matter *submitted* on such rehearing contrary to and in violation of the provisions of Section 22 of the said Public Service Commissions Law of the State of New York."

In its answer the Public Service Commission alleges as follows (italics ours):

"VIII. Admits each and every allegation contained in that paragraph of the Bill of Complaint marked or numbered XII except that it denies that the Public Service Commission of the State of New York for the First District has 'refused' for more than thirty days to determine the matters *submitted to it at such re-hearing,* and denies that the neglect of the Public Service Commission of the State of New York for the First District to determine matters *submitted on such re-hearing* is 'contrary to and in violation of the provisions of Section 22 of said Public Service Commissions Law of the State of New York' as alleged in folio 45 of said paragraph XII, and further denies each and every allegation contained in folios 46 and 47 of said paragraph XII of the Bill of Complaint."

In other words, by its answer in this case the Public Service Commission admitted the allegation that on the 10th day of November the matter was *finally submitted* to the Public Service Commission of the State of New York for the First District.

Again, by its answer in this case the Public Service Commission "for a first separate and distinct defense to complainant's alleged cause of action," alleged as follows:

"Said Alfred M. Barrett, constituting the Public Service Commission of the State of New York for the First District, further answering the Bill of Complaint herein, and for a first separate and distinct defense to complainant's alleged cause of action, alleges:

"XII. Upon information and belief, that complainant has an adequate remedy at law by pro-

curing a writ of mandamus compelling this defendant to make a determination in respect of the matters *submitted to it on the re-hearing of the application* of the Belt Line Railway Company for a modification of the order of October 29, 1912, and by reviewing on a writ of certiorari in the Appellate Division of the Supreme Court of the State of New York, said determination of this defendant if it is unsatisfactory; and that complainant has a further adequate remedy at law by making application to this defendant under Section 49, subdivision 1 of the Public Service Commissions Law of the State of New York, for a general increase in fare over its entire line."

Moreover, this action was commenced on December 16th, 1920, the motion for an injunction *pendente lite* was argued on December 30th, 1920, and the injunction was granted on January 26th, 1921, during all of which time the Public Service Commission could have rendered a decision.

The fact that the pleadings expressly admit that the matter was finally submitted on the re-hearing, is a conclusive answer to the statement on page 44 of the appellant, Transit Commission's brief to the effect that the Belt Line Company introduced no evidence before the Master that it had requested the Commission to determine the rehearing or that the Commission had refused to do so.

The statement on page 43 of the Transit Commission's brief that the Commission did not take any action on the Belt Line Company's application for a rehearing "but waited for the Receiver to act" is belied by the fact that although it acted on the Receiver's application for a re-

hearing on August 31st, it never acted on the Belt Line Company's application for a rehearing until November 4th.

Before closing the discussion on this point, however, it is necessary to call attention to the statement on page 46 of the brief of counsel for the Transit Commission, in which, referring to the fact that there was correspondence between Messrs. Winthrop & Stimson, counsel for the Receiver of the New York Railways Company, and the Public Service Commission (Exhibits DD, DE, DF, R. pp. 426-429), the statement is made that:

> "* * * there was an ingenious manipulation of procedure by one party, resulting in a short delay, while the other party (this plaintiff) prepared its bill and moving papers and invoked federal jurisdiction."

If this statement means anything, it means that Messrs. Winthrop & Stimson and the attorney for the plaintiff in this case were in collusion and Messrs. Winthrop & Stimson were engaged in delaying action by the Public Service Commission in order that the Belt Line Company might invoke federal jurisdiction. In making such a statement counsel for the Transit Commission have overstepped the bounds of fair argument and have made a statement which they can in no wise substantiate, and of which there is, and can be, no proof and which is contrary to the fact. The fact that there was correspondence between Messrs. Winthrop & Stimson and the Public Service Commission concerning certain corrections in the minutes was unknown to the Belt Line Company or its counsel, was apparently unknown to, or if it was known it was concealed by, the counsel for the Public Service Commission who drew its answer in this case. In its answer the Public

Service Commission admitted that the rehearing had been finally submitted to it.

This act of the counsel for the Transit Commission in making the statement above quoted is all the more unfair because they have never before intimated such a thing until the District Court below had before it the confirmation of the Master's report and the granting of the final decree; in other words, they have not made such a charge "in the open" at a time when Messrs. Winthrop & Stimson and the attorney for the Belt Line Company could have refuted any such insinuation under oath.

(2)

The claim that the Belt Line Company's resort to the Federal Court was premature as well as unfounded because the Belt Line Company's two-cent share of the five-cent joint rate established by the Commission was never fixed by the Commission but was agreed upon by the interested parties, is conclusively answered by the decision of this Court in *Northern Pacific Railway Co.* v. *North Dakota*, 236 U. S. 585. In that case the Supreme Court of the United States enjoined the enforcement of a joint rate *notwithstanding that the company had agreed upon the basis of a division of the joint rate without any appeal to the board of railroad commissioners.* In that case even the State Court which upheld the rate refused to base its decision upon the agreement of the connecting carriers concerning the division of the joint rate.

The Joint Rate Order of October 29, 1912 Was In Invitum Both with Respect to the Central Park Company and the Belt Line Company.

The order of October 29th, 1912 was imposed on the railroad companies therein named *in invitum*.

The brief for the appellant, Transit Commission, states (p. 19):

> "The order of the Commission thus has the force and effect of a State law or statute."

In other words, the appellants predicate—as they must—their right to be in this Court on the basis of the order of October 29th, 1912 having the force of a State statute. There is certainly nothing voluntary about a State statute or law.

The order establishes through routes and joint rates.

The opinion of the Public Service Commission at the time it made the order of October 29th, 1912, states (Exhibit BV, R. p. 378, at fol. 594):

> "Under the provisions of subdivision 3 of Section 49 of the Public Service Commissions Law as amended in 1910, since the through routes and joint rates were not established by the companies within the time specified in the order of July 11, 1911, the Commission is now empowered in this proceeding to prescribe joint rates as a maximum to be charged and to require the companies within a specified time to agree upon the division of the joint rates."

The appellant, Transit Commission, emphasizes the fact that the Central Park Company (the Belt Line Company's predecessor) expressly accepted this order thus making the order a voluntary agreement on the part of the Central Park Company.

Pursuant to Subdivision 3 of §49 of the Public Service Commissions Law, a copy of which is set forth at page 4 of this brief, the order of October 29th, 1912, required the Central Park Company and the other companies there-

in named, on or before November 6th, 1912, "to notify the Commission whether the terms of this order are accepted and will be obeyed" (R. p. 17, fol. 37).

Thus, the Central Park Company was required by law to state that it would accept and obey or that it would not accept and would disobey. If it chose to notify the Commission that it would not accept and would disobey, the Central Park Company would be required to defend itself in criminal proceedings to punish it for such disobedience or to defend proceedings brought to enforce such order.

Naturally, the only basis upon which the Central Park Company could succeed in any of such proceedings would be on the ground that the order of October 29th, 1912, was *at that time* confiscatory.

Therefore, when the Central Park Company notified the Commission in writing (R. p. 391) that the order of October 29th, 1912, was accepted and would be obeyed, it was nothing more than a statement that it would not *at that time* contest the order.

The acceptance which the Central Park Company made, *required as it was by the statute*, was certainly not a voluntary agreement on the part of the Central Park Company that it would forever comply with the order of October 29th, 1912, after it became confiscatory.

Any statute which could require a public service corporation to accept a rate and forever foreclose itself from contesting that rate when it became confiscatory, would of itself have been unconstitutional and intolerable.

Moreover, the order of October 29th, 1912, shows on its face that it was subject to changed conditions because the order itself provides that the order shall "remain in force as to each through route and joint rate until modi-

fied or abrogated by further order of the Commission" (R. p. 17).

Nor does the agreement made between the plaintiff's predecessor, Central Park Company, and the other corporations affected by the order of October 29th, 1912, with reference to the division of the rate *so fixed by the Commission* prevent any party to such joint rate from contesting it.

Subdivision 3 of §49 of the Public Service Commissions Law, which is the statutory authority for the order of October 29th, 1912, contains the following provision:

> "* * * and in case such agreement be not so made within the time so specified the commission may declare by supplemental order the portion thereof to which each common carrier, railroad corporation or street railroad corporation affected thereby shall be entitled, and the manner in which the same shall be paid and secured; such supplemental order shall take effect as part of the original order from the time such supplemental order shall become effective."

Therefore, when the Central Park Company, under the compulsion of the order of October 29th, 1912, as well as under the compulsion of the statute, agreed on a division of the joint rate, this act certainly was not voluntary.

Furthermore, the division of the joint rate, whereby the Belt Line Company received two cents and the intersecting carriers having the long north and south haul, received three cents, is the most favorable division which the Belt Line Company could obtain. This is established both by the pleadings and by the undisputed testimony.

In Subdivision 7 of the complaint (fol. 6, R. p. 4), it is

stated that the ratio between the distance which a through route passenger could travel over the lines mentioned in the order of October 29th, 1912, other than the 59th Street line of the Belt Line Company, as compared with the distance which such a passenger could and can travel over the 59th Street Line of the Belt Line Company under the order, was and is not less than three to two, which was the ratio used in fixing the division of the joint rate of five cents established by the order of October 29th, 1912. This allegation was not denied by the Public Service Commission (the *predecessor* of the Transit Commission), and on the trial of this case the Belt Line Company proved this allegation by the witness William E. Thompson, and the defendants made no attempt to dispute that proof. In other words, the only proof in the Record is the ratio of the length of haul. Therefore, the vague intimations of counsel for the Transit Commission that some other facts might be material in the division of the said joint rate, are beside the point and render inapplicable the citation of *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274.

The half-hearted statement by the counsel for the Transit Commission on page 46 of their brief that

> "It may well be that if the plaintiff had insisted on a larger share and had applied to the Commission for relief, a different apportionment would have been made"

does not merit serious consideration in view of the fact that the Receiver of the New York Railways Company has ever since November 24th, 1919, been complaining of the three-cent share of the joint rate to which he was entitled (R. pp. 395-396) and by his counsel, Mr. Henry L. Stimson,

joined as *amicus curiae* in the application for the interlocutory injunction herein (R. p. 67).

Another conclusive answer to the contention of the appellants that the rate-making process had never been initiated or concluded, is found in the fact that not only was the order of October 29th, 1912, *in invitum* with respect to the Central Park Company but the Public Service Commission made the order also *in invitum* so far as the Belt Line Company was concerned by annulling the revised tariffs filed by the Belt Line Company with the Public Service Commission on May 22nd, 1920, which revised tariffs eliminated the joint rate between the 59th Street Line of the Belt Line Company and the other lines named in the order of October 29th, 1912, excepting the lines of the Third Avenue Company and the Forty-second Street Company (Exhibit BL, R. pp. 335-347).

These tariffs were to become effective on June 22nd, 1920, and on June 8th, 1920, the Public Service Commission suspended the tariffs until July 22nd, 1920 (Exhibit Q, R. p. 304). Under the order of July 9th, 1920, the Public Service Commission annulled the revised tariffs which the Belt Line Company had filed on May 22nd.

By §29 of the Public Service Commissions Law, a copy of which is hereto annexed and marked "Appendix B," the Belt Line Company could not change any rate or fare or any joint rate or fare "except after thirty days' notice to the Commission" and the filing of revised tariffs for thirty days. The orders of the Public Service Commission suspending and finally annulling the revised tariffs filed by the Belt Line Company were under §29. These acts of the Commission in suspending and finally annulling the revised tariffs filed by the Belt Line Company show the absurdity of the contention of the appellants that the joint

rate which we are seeking to enjoin was in any way voluntary, or was never initiated or completed.

If these tariffs had not been prevented from going into effect by the action of the Public Service Commission, the Belt Line Railway Company would have been relieved from carrying its joint rate passengers at a two-cent rate. Thus, the action of the Commission was an affirmative act in preventing the Belt Line Company from receiving any other rate than two cents from each joint rate passenger.

POINT II.

The order of October 29th, 1912, was not a service order or requirement.

The appellant Transit Commission, in Point II of its brief (p. 20) contends that the order of October 29th, 1912 was a service order, and in its Point III argues (p. 42) that a service order or requirement should not be held confiscatory unless it imposes an additional expense unreasonably in excess of the added revenue which it produces, and then only if the total business fails to yield an adequate return. The fallacy of such arguments is readily apparent.

In the first place the proof shows that the order of October 29th, 1912, would, but for the injunction herein, have imposed an additional expense unreasonably in excess of the added revenue (if any) which it would have produced, and that the Belt Line Company does not earn a fair return on its entire business.

In the second place the order of October 29th, 1912 was not a service order or requirement.

The methods of travel and the accommodations offered for travel were the same after as before the order of October 29th, 1912. They are the same now. Physical transfers from the cars of one company to the cars of another company were necessary on 59th Street before the order was made, as they were after the order was made, and as they are now.

In other words, the 59th Street Crosstown Line is just as much of a link "in the chain of transportation of passengers who wish to go up or down town and also east or west"*, whether the order of October 29th, 1912 is in effect or not. The order of October 29th, 1912 merely changed the rate of fare which the passengers using these lines must pay.

Therefore, the order of October 29th, 1912 was not a service order but was a joint rate order between independent companies.

The appellants cite the decision of this Court in *Chesapeake & Ohio Railway* v. *Public Service Commission,* 242 U. S. 603, as authority for the proposition that a service order will not be held unreasonable, confiscatory and invalid merely because it involves or may involve some loss. That case is not applicable for two reasons:

(1) The order of the Public Service Commission which was upheld in that case was a service order because it required more trains and was not the fixing of a rate between two independent carriers; and

(2) The order of the Public Service Commission was sustained because its requirement was an

*NOTE.—The quotation is from page 20 of appellant, Transit Commission's brief.

obligation which the company accepted in its franchise, but such reasoning cannot possibly apply to this case because there was certainly no franchise requirement for the Belt Line Company to maintain a joint rate with an independent company.

Nor is the case of *Georgia Railway Co.* v. *Decatur*, 262 U. S. 432, cited by the appellant, Transit Commission, on page 22 of its brief, applicable. In that case, the railway company, in consideration of being permitted to abandon certain of its lines, agreed to a specified rate and transfer arrangements, and it was this contract arrangement which the company later tried to avoid. The order which was upheld in the above case merely required the company to do what it had agreed to do, as well as requiring the company to provide more seats for passengers.

The quotation made by the appellant, Transit Commission, on page 21 of its brief from the case of *Railroad Commission* v. *Eastern Texas R. Co.*, 264 U. S. 79, (cited in appellant, Transit Commission's, brief as 68 U. S. [Lawyers' ed.] 309), shows on its face that it has no application to this case.

All of the above cases relied upon by the appellant Transit Commission involved purely service requirements or requirements to perform obligations under the respective companies' franchises, whereas, as above stated, the order of October 29th, 1912 was not a service order or an order to perform a franchise obligation, but instead was a joint rate order between independent carriers.

POINT III.

The joint rate order of October 29th, 1912, is confiscatory.

1.

As previously stated, the Public Service Commission on July 9th, 1920, "after a careful consideration of the testimony and briefs submitted by counsel," held (R. p. 48) that

> "the maximum joint rate of five cents fixed in the said order of October 29th, 1912,* is, by reason of the changed conditions under which the said railroad companies are operating, unjust, unreasonable and *insufficient to render a fair and reasonable return for the service furnished.*"

The counsel for the Transit Commission evidently consider the above finding of the Public Service Commission embarrassing and on page 30 of their brief on this appeal, after seeking to explain this finding, state:

> "Moreover, the Commission never found that the five cent rate was confiscatory."

We respectfully submit that the language of the order of the Public Service Commission of July 9, 1920, wherein the Commission states that the joint rate of five cents fixed by the order of October 29, 1912, was, by reason of the changed conditions

> "insufficient to render a fair and reasonable return for the service furnished"

is a correct definition of confiscation and its finding in those words equivalent to a finding of confiscation.

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* Erroneously printed in Record as "1920."

We find nothing in the three cases cited by the Counsel for the appellant Transit Commission on page 31 of its brief which in any way supports the proposition that a rate may be unreasonable and inadequate without reaching the point of confiscation.

We call attention also to the fact that nowhere in their brief have Counsel for the Transit Commission referred to or quoted the actual language of the order of July 9th, 1920, to-wit, "insufficient to render a fair and reasonable return for the service rendered."

2.

The cost per passenger is far in excess of the two cents which the Belt Line Company would receive under the joint-rate order of October 29th, 1912.

It cannot be disputed that the cost of the Belt Line Company of carrying each passenger transported during the years hereinafter set forth, was as follows (R. pp. 40-46; 330-334):

Year ended June 30th	Passengers at 5c each	Passengers at 2c, being joint rate passengers	Cost per passenger including operating expenses and taxes but not including depreciation and interest charges	Cost per passenger exclusive of depreciation but including interest at 5% on $1,823,091.53
1918	6,450,687	13,512,033	2.75c	3.20c
1919	5,440,766	12,817,674	2.49c	3.00c
1920	7,186,735	10,171,479	2.93c	3.46c
1921	8,119,325	7,948,148	3.52c	4.10c
1922	8,100,009	5,720,102	2.92c	3.58c
3 months ended September 30, 1922	1,690,229	1,426,923	3.03c	3.77c

During the twenty months after the injunction (February 1, 1921 to September 30, 1922), the cost of carrying each passenger was 3.84c. (R. p. 326) and if the receipts and expenses for this period are adjusted on the basis of the increase in traffic and the consequent increase in expenses if the same number of joint rate passengers had been carried during that twenty months period as in the corresponding twenty months period prior to the injunction, the cost of carrying each passenger would have been 3.72c. (Exhibit BP, R. Insert p. 356).

If a charge for depreciation is included and also the amount necessary to make up a full return on the actual value of the Belt Line Company's property, the cost of carrying each passenger is far in excess of the figures above given.

It is plain, therefore, that the order which requires the Belt Line Company to carry passengers at a joint rate under which it receives only two cents per passenger, which is far below the actual cost, is confiscatory.

The fallacy of the argument of the appellants to the effect that the more passengers the carrier carries the less the cost is per passenger is easily shown by the undisputed fact in this case that if the Belt Line Company had been required after February 1, 1921, to carry additional joint rate passengers it would have had to increase its car mileage, and therefore its expenses, in the same proportion as its passengers increased.

The Statutory Court based the interlocutory injunction granted in January, 1921, upon the facts above set forth.

The above facts formed one of the grounds on which the District Judge based the injunction now appealed from (fol. 197, R. p. 119).

The Counsel for the Transit Commission attempt to

make it appear that the District Judge based his decision in this case upon the above facts "with some reluctance". The opinion of the District Judge reveals no such reluctance. On the contrary, the District Judge distinctly states that the above facts constitute "another obstacle to the contentions put forth by defendants" (R. p. 119).

The soundness of the principle upon which the Statutory Court and the District Judge held that the plaintiff was entitled to relief from the joint rate order, is sustained not only by the particular facts in this case, but also by the decision of this Court in *Northern Pacific Railway Co.* v. *North Dakota*, 236 U. S. 585. In that case, the Legislature of North Dakota had attempted to fix joint rates for transportation of lignite coal over the lines of two or more railroad companies. The Northern Pacific Railway Company and the Minneapolis, St. Paul & Saulte Ste. Marie Railway Company contested this rate. The State Court upheld the writ on the ground that

> "* * * the carriage of lignite coal increased 'the railroad expenses but sixty per cent. of the usual statutory rate for the lignite haul,' that is, that this percentage of the rate covered the 'out-of-pocket cost' of the traffic, the remaining expenses in this view being such as would have been incurred had no lignite coal been transported" (pp. 591, 592).

In holding that the "out-of-pocket cost" theory was improper, this Court (Justice Hughes) said (pp. 596-597, italics ours):

> "* * * We find no basis for distinguishing in this respect between so-called 'out-of-pocket costs,' or 'actual' expenses, and other outlays which are none the less actually made because they are appli-

cable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. *That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry.* The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost the entire cost must be taken into account."

We have italicized that portion of the above decisions of this Court which sets forth the theory on which the statutory court gave the interlocutory injunction which is also one of the grounds upon which the District Judge granted the final injunction now appealed from. In this case the Belt Line Company has (in accord with this Court's ruling in the above case) divided the expenses of

its business at a particular time by what it carried at that time, whether they were five-cent passengers or two-cent passengers.

The result of the same computation applied to this case as was approved by this Court in the case just cited is that the cost of carrying each passenger including the two-cent passengers is far in excess of the two cents received from such passenger.

The counsel for the Transit Commission in Point III of their brief, contend that the decisions of the Courts below in granting the Belt Line Company relief upon the above facts are "wholly unsound and erroneous," and, unable to refer to any authority in support of their contention, advance a most amazing argument, the fallacy of which is readily apparent.

This argument of the Transit Commission which we say is most amazing, is based upon the proposition that the Belt Line Company could, in the period after the injunction, have carried 8,000 to 10,000 additional passengers per day, an increase of from 20% to 25% with "practically no added expense." Counsel states on page 38 of their brief (italics ours):

> "There will be no appreciable increase in expense *unless the added traffic requires more cars;* and the amount of increase may be fairly measured by the added expense of operating the additional cars and the increased car mileage, if any."

Again, on page 40, counsel are unable to advance their argument without presupposing that the carrying of the additional passengers (8,000 to 10,000 per day—20% to 25%—) can be done "without increasing its scale of service," or "upon a given scale of service." The advancing of

such an argument by counsel for a regulatory commission in the State of New York is most disingenuous in view of the testimony in this case of the Transit Commission's own Supervising Transit Inspector, and the acts of its predecessor, Public Service Commission. Such an argument presupposes

> (1) that before the injunction (cutting off the joint rate) the Belt Line Company was operating sufficient cars for all the passengers, including the joint rate passengers;
>
> (2) that since the injunction the Belt Line Company is wasting service and running more cars than now required because of the cutting off of the joint rate passengers; and
>
> (3) that in the period after the injunction the Belt Line Company could increase its passengers from 8,000 to 10,000 per day (an increase of 20% to 25%) without increasing its service and its car mileage.

Even the remotest possibility of any one of the above assumptions is conclusively negatived by the positive and undisputed testimony of the Transit Commission's own Supervising Transit Inspector and the acts of its predecessor, the Public Service Commission (R. pp. 307-321).

It is futile for counsel to base an argument upon the proposition that the Belt Line Company, prior to the injunction, was operating sufficient cars to handle all passengers, including the joint rate passengers, because the five letters from the Public Service Commission, the last

two of which were on November 12th and November 16th, 1920, called attention to the "excessive over-loading," and *summarily ordered the Belt Line Company to increase its service.*

It is absurd for counsel to argue on a supposition that in the period after the injunction the Belt Line Company was operating more cars than necessary due to the cutting off of the joint rate passengers, and to argue on the further supposition that the Belt Line Company could carry 8,000 to 10,000 more passengers per day (an increase of 20% to 25%) without increasing its cars and its car mileage, because its own Supervising Transit Inspector, William O. Smith, testified unequivocally, even on direct examination by the same counsel for the appellant, Transit Commission, as appears on this appeal that at that time (January, 1923) **even without the increase in passengers which would result from a resumption of the joint rate, the Belt Line Company should increase its cars and car mileage at least 10%.**

On page 38, counsel for the Transit Commission admit by their argument that there would be an appreciable increase in expense if the added traffic required more cars, and state that the increase in expense "may be fairly measured by the added expense of operating the additional cars and the increased car mileage". Not only does Mr. Smith, the Supervising Transit Inspector of the appellant, Transit Commission, state that *at the present time,* without the additional 8,000 to 10,000 more passengers per day resulting from the joint rate traffic, the Belt Line Company should operate at least 10% more service, but the undisputed testimony of Mr. Thompson unequivocally establishes as the fact in this case that if the joint rate passengers were again carried it would re-

quire the operation of additional cars and increased car mileage, the additional expense of which would be in the same proportion as the increase in the number of passengers carried.

The attempted comparison between the manufacture and distribution of gas and the travel on street surface railways (pp. 39 and 40 of appellant, Transit Commission's, brief) is likewise fallacious because it is based on the supposition that the street railway company can carry more passengers "without increasing its scale of service," and as we have shown, no one should know better than the counsel for the Transit Commission that any such supposition is contrary to the proven facts in this case.

The observation by the counsel for the Transit Commission on page 39 of their brief, that

> "it is good business policy for a carrier to take such additional revenue as it can get, rather than to wait in vain for patronage which will not come at higher rates",

is shown to be based upon a false premise by reference to Exhibits BC and BD (R., pp. 326 and 328), which show that during the twenty months' period after the injunction (February 1, 1921 to September 30, 1922) the Belt Line Company carried 13,426,836 five-cent passengers, as compared with 9,846,013 five-cent passengers in the corresponding twenty months prior to the injunction.

This shows that a very large number of the passengers who formerly rode on Belt Line Company's cars under the joint rate fare, from whom the Belt Line Company received only two cents, are now being carried by the Company at a full five-cent rate.

3.

The appellants have sought to uphold the joint rate order of October 29th, 1912 on the theory, unsupported by any facts in this case, that the expenses of a resumption of the transfers would not exceed the revenue therefrom. This is in reality the "out-of-pocket cost" theory which was disapproved by this Court in *Northern Pacific Railway Co.* v. *North Dakota* (*supra*), to which we have already referred.

But even though the "out-of-pocket cost" theory were applied to this case, the undisputed facts show that if the Belt Line Company were required to comply with the joint rate order of October 29th, 1912, the increase in its operating expenses would be in excess of the income to be received.

The counsel for the Transit Commission have seized upon the fact that because the cutting off of the joint rate by the interlocutory injunction herein (thereby cutting off eight to ten thousand passengers per day) relieved the Belt Line Company from the necessity of increasing its cars and car mileage as it was being summarily ordered to do by the Public Service Commission, the Belt Line Company did not decrease its car mileage after the injunction and from this fact argue that the cutting off of the joint rate did not decrease the Company's expenses. Thus counsel state on page 34 of their brief, that the elimination of transfers did not bring about "any appreciable decrease in car mileage", and then state:

> "If taking away the transfers did not decrease the car mileage, there is no basis for any inference that their restoration would increase it."

We have already shown from the testimony of Mr.

William O. Smith, the Supervising Transit Inspector of the appellant Transit Commission and by the letters of the Public Service Commission that there is no possible foundation in this case for the statement above quoted but, on the contrary, the proof squarely and conclusively shows that were it not for the interlocutory injunction herein the Belt Line Company would have had to increase its car mileage which would have meant a corresponding increase in operating expenses.

In this connection, we wish to emphasize the fact which is well known to the counsel for the Transit Commission, that at no time has the Belt Line Company claimed that the decrease of expenses actually incurred after the injunction was due to the cutting off of the transfers under the interlocutory injunction herein.

For this reason it is an idle waste of time for the counsel for the Transit Commission to devote many pages of their brief to a refutation of an argument which neither we nor the Court below have relied upon.

What the Belt Line Company claims and what has been established by the uncontradicted proof herein, is that if the injunction order had not been obtained the Company would have been compelled to greatly increase its car mileage and thereby proportionately increase its operating expenses.

It was indisputably proven in this case that the increase in mileage and operating expenses which will be necessary if the Belt Line Company were required to resume the carrying of joint rate passengers, would result in an increase in operating expenses far in excess of the revenue to be derived from the joint rate passengers.

As we have shown (*supra*, pp. 23, 24) the Belt Line Company did not earn enough in the period after the

injunction (cutting off the joint rate) to pay a return on its property investment of $2,600,000. The deficit was over $59,000. If the Belt Line Company lost $59,000 even without the joint rate passengers, it follows that this loss would be greater if it were required to carry the two-cent passengers because, as we have stated, it is undisputed in this case that as the number of passengers is increased, the car mileage and expenses would increase in the same proportion.

The Learned District Judge stated that the computation of the increase in probable revenue for the year ended June 30, 1922 of $42,000 took no account of the loss of revenue which the Belt Line Company would sustain by reason of the fact that many of the passengers from whom it was receiving five cents since the injunction, would be two-cent passengers if the joint rate were in effect.

As a matter of fact, the figure of $42,000 as a possible increase in revenue for the year ended June 30, 1922, is too high. The Learned District Judge assumed that for the year ended June 30, 1922 there would be a 12½% increase in the number of passengers carried, and a computation of additional revenue of two cents per passenger on that basis, without making any allowance for a possible loss of revenue by reason of the five-cent passengers who would become two-cent passengers, would show an increase in revenue of $35,597.74—12½% of 14,239,099 (the number of passengers carried during the year ended June 30th, 1922) (Exhibit BF, R. p. 332) equals 1,779,887, and 1,779,998 passengers at two cents each equals $35,597.74.

It is to be noted also that the Learned District Judge figured only a 10% increase in expense, whereas, as we have shown, the increase in expense would be the same as the increase in the number of passengers carried for

the year ended June 30, 1922. Even on the basis suggested by the District Judge, the additional revenue would have been $35,597.74, but this amount would be practically entirely wiped out by the loss of five-cent passengers who would become two-cent passengers under the joint rate. Thus, there would be nothing to offset the additional expense of $46,000.

Just how much worse off the Company would have been during the period after the injunction if it had been required to carry the joint rate passengers, is shown by Exhibit BP (R. p. 256), from which it appears that the balance of $48,583.29 available for depreciation and a full return on the property investment (which, after deducting the amounts necessary for a full return on the property investment leaves a deficit of $59,492.46, without making any allowance for depreciation) would have turned into a deficit of $217,755.55, or, as heretofore shown (*supra*, pp. 33, 34) a deficit of $138,917.05 if the increase in expense were only half of the increase in the passengers.

The actual number of five cent and two cent passengers and free transfer passengers carried in the post-injunction period (February 1, 1921 to September 30, 1922) was 23,631,081 (Exhibit BP, R. Insert, p. 356), and from these passengers the Company received in fares $866,434.35.

The above Exhibit also shows that if in that period the injunction herein had not been in effect and the Company had carried the same number of five cent and two cent passengers that it carried in the corresponding pre-injunction period, it would have carried 28,685,771 passengers and would have received in fares during the post-injunction period the sum of $860,103.46.

The above shows that from the 23,631,081 passengers actually carried in the post-injunction period, the Belt

Line Company received more in fares than it would have received if the injunction had not been in force and it had carried 28,685,771 passengers, including the joint rate passengers now cut off by the injunction. The reason for this is that the receipts from the additional two cent passengers who would have been carried had the injunction not been in force, would not have equalled **the loss which the Company would have sustained from the fact that many passengers now paying five cent fares would, if the joint rate were resumed, become joint rate passengers from whom the Company would only receive two cents.**

It is obvious, therefore, that instead of the resumption of the joint rate resulting in added revenue to the Company, as assumed by the appellants herein, it would, in effect, as above shown, result in less revenue to the Company.

And not only would there be no added revenue from the resumption of the joint rate passengers, but there would be additional operating expenses due to the necessity of furnishing more cars and more car mileage to take care of the additional joint rate passengers.

Exhibit BP shows that the actual operating expenses, not including any allowance for depreciation, during the period February 1, 1921 to September 30, 1922, was $750,-842.84, and that if the same number of passengers had been carried during that period as were carried in the pre-injunction period—February 1, 1919 to September 30, 1920—the operating expenses, exclusive of depreciation, would have been $908,519.83, or an increase in operating expenses for that period of $157,676.99.

To summarize, the resumption of the carrying of joint rate passengers during the 20 months February 1, 1921 to September 30, 1922, would, as shown on Exhibit BP, have

decreased the revenue by $6,330.89, and *increased the operating expenses,* exclusive of depreciation, by $157,676.99, making the loss from the joint rate passengers if they had been carried in that period $164,007.88, and such loss does not include any interest on mortgage or note indebtedness or return on the Belt Line Company's property.

Thus it is clear that the joint rate order of October 29th, 1912 is confiscatory, not only by the finding of the Public Service Commission itself to that effect, but also upon any of the theories which have been applied in this case.

POINT IV.

The Belt Line Company is entitled to complain of the joint rate order of October 29, 1912, as an infringement of its constitutional right.

This point is in answer to Point VI in the brief of the appellant, Transit Commission, wherein it is argued that because the plaintiff came into existence after the order of October 29th, 1912, it is not entitled to complain of such order as an infringement of any constitutional right, and in making such point, the appellants rely upon the decision of this Court in *Interstate Railway Co.* v. *Massachusetts,* 207 U. S. 79. This is the point upon which the appellant, Transit Commission, relied in its motion to dismiss the complaint, which motion was denied by Judge Hough (see Opinion, R. p. 75).

The decision of this Court in *Interstate Railway Co.* v. *Massachusetts* has no application to this case.

Concededly, the Belt Line Company came into existence as the reorganization of the Central Park Company under §9 of the Stock Corporation Law. The Certificate of In-

corporation of the Belt Line Company (R. p. 286) conclusively shows this, and, in fact, this is unquestioned.

It follows, therefore, that the Belt Line Railway Corporation *stands in the shoes of the Central Park Company,* because former §9 of the Stock Corporation Law (Appendix B) under which the Belt Line Company came into existence, specifically states:

> "*Such corporation shall be vested with and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in, the corporation last owning the property sold,* or its receiver, and shall be subject to all the provisions, duties and liabilities imposed by law on that corporation."

The Central Park Company, which was "the corporation last owning the property sold," certainly had the right to attack the order of October 29, 1912, as unconstitutional at any time when that order became confiscatory, and that right was one of the rights which "vested" in the new corporation and which the new corporation is "entitled to exercise and enjoy."

It follows, therefore, that there must be read into, and as a part of, the charter of the Belt Line Company, the "right" which the Central Park Company had to attack the order of October 29th, 1912, on the ground of its unconstitutionality whenever it should become confiscatory.

The appellants, in advancing their argument, rely upon that part of §9 which we have not italicized above, to wit,

> "and shall be subject to all the provisions, duties and liabilities imposed by law *on that corporation.*"

The fallacy of such an argument is obvious.

The same section of the law which contains the provision upon which the appellants rely also expressly provides that the reorganized corporation shall have all the "rights, privileges and franchises" of the former corporation. In other words, the Belt Line Company, not being a party to the order of October 29th, 1912, in taking under §9 the obligation of the Central Park Company, also took with that obligation all the rights which the Central Park Company had with respect to that obligation including the right to contest the order when it became confiscatory.

Furthermore, the argument of the appellants that the Belt Line Company has no right to contest the unconstitutional order does violence to the constitutional rights of the purchaser at the mortgage foreclosure sale under which the property of the Central Park Company was sold.

The franchises of the Central Park Company to operate a railroad—coming as it did direct from the Legislature (Chapter 511 of the Laws of 1860)—was property, which, as held in *People* v. *O'Brien*, 111 N. Y., 1, cannot be impaired or confiscated. The Belt Line Company acquired this railroad and franchises from the purchaser at the foreclosure sale under the mortgage made by the Central Park Company on December 1, 1872 (R. p. 271) *40 years prior to the order of October 29th, 1912.* The State of New York authorized the Central Park Company to mortgage its road and franchises. The right to mortgage gives to the mortgagees the right to sell on foreclosure, and if the purchaser on foreclosure cannot acquire that which was mortaged, then, of course, the sale would be a farce.

In *People ex rel. Westchester Street R. R. Co.* v. *Public Service Commission*, 158 App. Div., 251, at 253, it was held:

> "The laws of the State contemplate that a railroad shall be operated by a railroad company."

citing

> *Trojan Ry. Co.* v. *City of Troy*, 125 App. Div., 362;
> *Village of Phoenix* v. *Gannon*, 195 N. Y., 471;
> *New York Terminal* Co. v. *Gaus*, 139 App. Div., 347, 348.

In addition to the above judicial decisions, the State of New York in enacting §9 of the Stock Corporation Law provided that the purchaser on such foreclosure sale can become a corporation for the purpose of exercising all the franchises and using the property purchased on the foreclosure sale.

Since, therefore, the purchaser on the foreclosure sale had the right to exercise the same franchises and the same rights which the Central Park Company had, and since the corporation stands in the shoes of the purchaser and, in fact, is the purchaser on such foreclosure sale, it follows that the Belt Line Company did not surrender, or accept in an impaired condition, the franchises, rights and property which were acquired under the mortgage.

This conclusion also follows from the decision of the New York Court of Appeals in *People ex rel. Third Avenue Railway Co.* v. *Public Service Commission*, 203 N. Y. 299. In that case, the Third Avenue Railway Company was incorporated under §9 as a reorganization of the Third Avenue Railroad Company. At the time of the incorporation of the new Company, §§53, 54 and 55 of the Public Service Commissions Law were in effect, and provided (§§53 and 54) that franchises and privileges could not be sold without the permission of the Public

Service Commission, and that securities could not be issued without the authority of such Commission. Nevertheless, the Court of Appeals held (p. 308, Cullen, Ch. J.):

> "These provisions have no application to the relator company. The franchise of the Third Avenue Railroad Company was property and could not be destroyed. (*People* v. *O'Brien*, 111 N. Y. 1.) The statute empowered that company to mortgage its property and franchises and under that authority they were mortgaged and sold to the individual relators who became the purchasers thereof. The right of the bondholders under the mortgage to have the mortgaged property sold in satisfaction of their claims and the right of the purchasers to the franchises and property bought by them were inviolable."

In other words, if the Belt Line Company is now required to operate its franchises at a loss because it cannot attack the order of October 29th, 1912, then the property which was mortgaged to the bondholders under the mortgage of the Central Park Company—made 40 years prior to the order of October 29, 1912—has been confiscated and its rights impaired.

In *Minor* v. *Erie Railroad Co.*, 171 N. Y. 566, the Court of Appeals of the State of New York held that the Erie Railroad Company, incorporated under §9 of the Stock Corporation Law before its amendment by Chapter 706 of the Laws of 1904, could not attack the constitutionality of the Mileage Book Act because §9 at that time read that when such corporation came into existence it was subject to all the provisions, duties and liabilities imposed by law "*on such corporations.*" In so holding, Chief Judge Parker, writing for the majority of the Court, said:

"If the Legislature had intended that the new corporation should be subject only to the same duties and liabilities as were imposed on the old corporation, the section would have read 'and shall be subject to all the provisions, duties and liabilities imposed by law on such *corporation*.' The Legislature, however, did not employ that language but said that it should be subject to the duties, etc., imposed by law upon 'such *corporations*' thereby indicating a purpose to subject it to all the general provisions of law governing railroad corporations. It cannot be urged that such use of the plural in the last line was inadvertent, for the section is very carefully drawn * * *."

After this opinion had been rendered in *Minor* v. *Erie Railroad Co.* (*supra*), and after reargument had been denied, the Legislature amended the law by providing exactly what Chief Judge Parker had suggested, except for the use of the words "that corporation" instead of "such corporations," thus making it much clearer.

If, therefore, in the case of *Minor* v. *Erie Railroad Co.*, the Erie Railroad Company could have attacked the unconstitutionality of the Mileage Book Act if the Stock Corporation Law read at that time the same as it did when the Belt Line Company came into existence, it follows that the Belt Line Company has the right to attack the unconstitutionality of the joint rate order of October 29th, 1912. In other words, it is clear that the Legislature intended by the amendment of §9 that the new corporation should stand in the shoes of the old one and should be vested with all the rights of the old corporation, unimpaired in any way whatever.

Moreover, as stated by Judge Hough (R. p. 76), a general statute is a very different thing from a regulatory order of the Commission.

Naturally, the general laws of a State are fairly well-known, but to require incorporators of proposed corporations and investors in the stock to examine every order of each of the regulatory commissions before incorporating or investing in stock, would be intolerable.

We repeat, however, that if anything in connection with the order of October 29th, 1912, is to be read into and as a part of the charter of the Belt Line Company, there must be included therewith the provision whereby the Belt Line Company had all the rights, franchises and privileges of the Central Park Company, including the right to attack the order of October 29th, 1912, on the ground of its unconstitutionality whenever it should become confiscatory.

It follows, therefore, that because the Belt Line Company stands in the shoes of the Central Park Company and has all the rights which the Central Park Company had, and also because the purchaser on the mortgage foreclosure sale bought the property and franchises of the Central Park Company unimpaired by any confiscatory orders, and for the further reason that regulatory orders of the Commission could never be placed in the same class as general statutes, the Belt Line Company has the right to complain that the joint rate order of October 29th, 1912, is confiscatory.

POINT V.

There has been no action or conduct on the part of the Belt Line Company which gives any foundation whatever for the appellants' claim that the Company is not entitled to equitable relief.

This Point is in answer to Point V in the brief of the appellant, Transit Commission, wherein that appellant seeks to argue that the Belt Line Company's conduct has been such as to disentitle it to equitable relief.

Notwithstanding the fact that there is no evidence on which the appellants can base such an argument, nevertheless even though there were evidence, this was a matter upon which the District Court exercised its discretion and the exercise of such discretion will not be disturbed by this Court.

For the reason, however, that the advancing of such an argument injects into the case the question of good faith, we propose to answer it.

We have already shown that the claim that there was collusive maneuvering between Messrs. Winthrop & Stimson and the attorney for the Belt Line Company is not only without any possible foundation, but is contrary to the Transit Commission's own answer in this case, and we have called attention to the fact that this insinuation was put into the case at the very last moment when the District Judge had before him the question of confirming the Master's report and granting the final injunction, at which time there was no opportunity for testimony under oath.

The suggestion that the Belt Line Company might have a reapportionment of the joint rate is absurd on its face, in view of the undisputed fact that the average length of

haul of the north and south lines is far in excess of the length of haul on the Belt Line Company's 59th Street Crosstown Line.

The statement that the Belt Line Company rejected the seven-cent joint rate, aside from being immaterial, is incorrect. All that the Belt Line Company did was to ask for a rehearing almost two months before the seven-cent rate was to take effect, and that certainly is not a rejection of it. The application of the Belt Line Company was never acted upon by the Public Service Commission until November 4th, 1920, almost four months after the application was made. In the meantime, however, on the application of the Receiver for the New York Railways Company, made August 28th, 1920, the Public Service Commission on August 31st, 1920, suspended the seven-cent joint rate. Therefore, aside from anything which the Belt Line Company did, the Public Service Commission suspended the joint rate and have never taken any action to make any other joint rate.

Any argument concerning the seven-cent rate is entirely immaterial because the only issue in this case and the only issue which there ever can be before any Court, is whether the five-cent joint rate order of October 29th, 1912, is confiscatory.

The Public Service Commission and the Transit Commission have always been entirely free to fix a joint rate order which is not confiscatory. The important point is that since the Federal Courts cannot make rates, the only issue which could possibly be before the Courts in this case is whether the five-cent rate is confiscatory, that being the only rate in force and the only joint rate which has ever been in force.

On pages 13 and 35, as well as under Point V of its

brief, the appellant, Transit Commission, claims that because other companies of the Third Avenue Railway System have obtained more passengers because of the cutting off of the transfers by the injunction herein, that such facts constitute inequitable conduct on the part of the Belt Line Company.

If the injunction in this case actually prevents confiscation of the plaintiff's property and prevents it from being compelled to carry passengers at a loss, it is entirely immaterial how that injunction affects any other railway company which is not complaining thereof.

But aside from the fact that the claim made by the appellant, Transit Commission, is entirely unfounded as well as immaterial, we are unable to understand by what motives such a contention is actuated or made by a regulatory commission. Bearing in mind that the outstanding fact upon which the appellant, Transit Commission, makes this contention is that a number of passengers who formerly, under the joint rate order, rode on lines of the Second Avenue Railroad Company and lines of the New York Railways Company, are now able to ride on the lines of the Third Avenue Company and the 42nd Street Company *without paying an extra fare of five cents*, the attempted criticism of the appellant, Transit Commission, is not only astounding but is beyond comprehension. We had understood that the Transit Commission and the defendant, District Attorney, assumed to act on behalf of the People of the State of New York, but the brief of the appellant, Transit Commission, discloses that the Transit Commission is complaining because a greater number of transfer passengers can still ride for a single five-cent fare by using the Third Avenue Company lines and the 42nd Street Company line on Broadway, and thus save

themselves from any financial loss, by reason of the injunction which has been granted in this case.

If the counsel for the Transit Commission were actuated by a desire to benefit the public, it is inconceivable that any complaint can be based upon the fact that the Belt Line Company when it asked for the injunction herein, excepted from the operation of such injunction the lines of the Third Avenue Company and the 42nd Street Company on Broadway, thus enabling many of the passengers to still have the same facilities which they previously had. It is certainly no reason for criticism or even unfavorable comment by the Transit Commission that the Belt Line Company sought to minimize the effect of the injunction asked for in this case.

If the Belt Line Company has been able, by eliminating the joint rate between itself and the Second Avenue Railroad Company and the New York Railways Company, to still retain the others which were included in the joint rate order of October 29th, 1912, that fact should be an argument in favor of the injunction herein and in no wise an argument against it.

POINT VI.

The District Court did not find, as claimed by Appellant Banton in his brief, that there was only a loss of $4,000 per annum on the joint rate traffic cut off by the injunction herein.

In the brief of Appellant Banton, the Corporation Counsel states (p. 2):

> "After a series of adjustments, all relating to expenses and revenues connected with the transfer

> traffic, many of them speculative and conjectural, the Court below found that there was only a loss of $4,000 per annum on said traffic (R. p. 119)."

and then argues in his Point I that such a loss is so negligible compared to the total traffic involved as not to justify a decree of confiscation, and argues in his Point II that accepting the finding of such a loss of $4,000 from the joint rate traffic, the Belt Line Company earned a fair return on the valuation found by the Master.

Both of said Points are based on a false premise, because the claimed finding of a $4,000 loss is deduced from the District Court's figures of $42,000, whereas Judge Knox, in his opinion, stated that his assumed additional revenue of $42,000 from resumption of joint rate passengers was (R. p. 119),

> "without reference to a possible loss of revenue to plaintiff arising from the fact that numerous passengers who now pay five cents for a ride on the 59th Street Crosstown Line, would, if transfers are restored, pay into the treasury of complainant but two cents per ride, * * *."

During the year ending June 30th, 1921, the Belt Line Company carried on its 59th Street line 7,600,575 five-cent passengers, whereas during the year ending June 30th, 1922, when the joint rate passengers cut off by the injunction were not carried, the Belt Line Company carried 8,100,009 five-cent passengers. In other words, after the injunction, the Belt Line Company carried in a year 499,434 more five-cent passengers than it carried in a year when the joint rate complained of herein was in effect.

The Master in referring to this large increase in five-cent passengers after the injunction stated (R. p. 93):

> "* * * There can be little doubt that the bulk of these passengers came from the 2 cent group of the earlier period. They had their accustomed N. or S. route with cross-over on 59th Street, and were satisfied to pay the additional five cents rather than take the trouble to find some new route. It is difficult to see where else they could have come from. There is no suggestion of any regional conditions tending to increase travel on 59th Street line, a ride beginning and ending on that line. General increase of population will not account for it * * *."

If, therefore, the joint rate was again put in force, the 499,434 five-cent passengers above referred to would become two-cent passengers, representing a lessening in revenue to the Belt Line Company of three cents from each of said passengers, or a lessening in revenue for the year 1922 of $14,983.02.

It follows, therefore, that if any consideration is to be given to the $4,000 loss deduced from the opinion of the District Court, which figure was expressly stated to be without reference to the loss of revenue from the conversion of five-cent fares to two-cent fares, then there must be added to said sum of $4,000 the sum of $14,983.02, making, even on the District Court's increase in operating expenses of only 10% to take care of the added joint rate passengers, a loss of $18,983.02, instead of a loss of only $4,000.

Furthermore, in arriving at the above figure of $18,-983.02, there was included in operating expenses **no allowance for depreciation.**

Furthermore, the loss of $4,000 referred to by the Appellant Banton, which he computed by deducting from the District Court's added operating expenses of $46,000 the District Court's added revenue of $42,000 (without considering loss from the conversion of five cent fares to two cent fares) is based upon the District Court's assumed increase in passenger expenses, if joint rate passengers were again carried, of only 10%, whereas the uncontradicted proof herein shows that if the joint rate passengers were again carried it would necessitate an increase in operating expenses of 21½%.

The arguments, therefore, of the Appellant Banton in his Point I and Point II are based on a false premise, in that they refer only to a loss of $4,000 instead of a loss of $18,983.02, plus an additional loss which would result if depreciation had been included, and plus a large additional loss which would result if the District Court had used in its calculation an increase in the operating expenses equal to the increase in passengers, namely, an increase of 21½% instead of only 10%.

POINT VII.

The Appellant Banton's argument in his Point II that the Belt Line Company would, if it resumed the joint rate traffic, earn a fair return on the property is contrary to the evidence herein.

The Appellant Banton states in his Point II that the Belt Line Company would, if it had resumed the joint rate traffic, have had a net return for the year ending June 30th, 1922, of $161,200, and that that would represent a 6.2% return on the Master's valuation of the property.

The figure of $161,200 referred to in said Point as a net return was arrived at by taking the figure of $165,199.90 stated by the Master (R. p. 108), as the revenue in excess of operating expenses for said year and deducting therefrom the "loss of $4,000," which as we have just pointed out, was erroneously assumed by the Appellant Banton to represent the District Court's finding of the loss which would result from the resumption of the joint rate traffic (R. p. 119).

There is no foundation under the evidence for the Appellant Banton's argument that the Company would have had a return of $161,200 for the year ending June 30th, 1922, if it had resumed the carrying of the joint rate passengers. The Master's figure of $165,199.90 was arrived at by taking as the revenue of that year, including interest on deposits made by the Company, the sum of $580,526.88, and deducting therefrom operating expenses of $415,-327.07, which produced the figure of $165,199.90. It will be noted that these figures are taken from Exhibit BF (R. p. 332) and that the operating expenses shown thereon *do not include any allowance for depreciation.*

Exhibit BH, which sets forth the income from July 1st, 1920 to September 30th, 1922, as per the books and reports to the Public Service Commission and to the Transit Commission, shows that for the year ending June 30th, 1922, there was a depreciation charge for that year of $47,192.55, so that if to the Master's figure of $415,327.07 for operating expenses is added the above charge for depreciation for that year of $47,192.55, the amount of revenue in excess of operating expenses and depreciation for that year would have been only $118,007.35. If from the last mentioned figure there is deducted, for purposes of argument only, not the loss of $4,000 used by the Appellant

Banton, but a loss of $18,983.02 from the carrying of joint rate passengers during that year computed on the basis of only a 10% increase in operating expenses, but without any allowance for depreciation, as hereinbefore referred to, the net return of the Company on that basis would have been $99,024.33 instead of $161,200 as argued by the Appellant Banton in his Point II, or a return of 2.15% on the valuation found by the Master, to-wit, $2,600,000. Or, to put it another way, said $99,024.33 would represent a 6% return upon only $1,650,405, or a return on a valuation $1,000,000 less than the valuation of $2,600,000 found by the Master.

As matter of fact if, in the above calculation there had been used an increase in operating expenses of 21% instead of 10% as used by the District Court which would have been necessary as shown by the undisputed evidence herein to cover the increase in cars and car mileage which would follow a resumption of the joint rate passengers, the above sum of $99,024.33 would be greatly reduced.

Taking the figure shown on Exhibit BP, showing the results of operation for the period February 1, 1921 to September 30, 1922, with the revenue adjusted so as to represent the carrying in that period of the same number of five cent and two cent passengers as were carried in the corresponding pre-injunction period, and with the operating expenses adjusted by increasing the actual operating expenses by 21½% to take care of the necessary increase in cars and car mileage that would have been necessary, as established by the undisputed testimony herein, it appears that for that period the adjusted revenue was $950,764.28 and that the adjusted operating expenses, without including any allowance for depreciation, were $908,519.83, leaving as the amount available for de-

preciation and return for said twenty month period the sum of $42,244.45.

We have hereinbefore shown that the depreciation charge on the books of the Company for one year, to-wit, the year ending June 30th, 1922, was $47,192.55, so that on the basis of an increase in operating expenses of 21½% and an allowance for depreciation for only one year, the said operating expenses for the 20 months subsequent to the injunction, including depreciation for only one year, would have *exceeded the revenue for said period, leaving no return whatsoever upon the Company's property.*

POINT VIII.

The valuation of the Belt Line Company's property found by the Master and approved by the District Court was justified by the evidence.

This point is in answer to Point III of Appellant Banton's brief.

Inasmuch as we have shown that if the Belt Line Company is compelled to resume the carrying of the joint rate passengers its operating expenses will exceed its revenues and thus afford no return on its property, it will be unnecessary to enter into any extended discussion of the question of valuation.

It cannot be disputed in this case, as we have shown, that in both the pre-injunction period and the post injunction period, the actual cost of carrying each passenger, not including any charge for interest on indebtedness and not including any return on the Company's property, is far in excess of the two cents which the Belt Line Company would receive under the joint rate order of October

29, 1912. On this basis, the rate is confiscatory, irrespective of any valuation whatever. In other words, on this basis the Belt Line Company's property is consumed.

Notwithstanding that we might well rest the case on this basis that the actual cost of carrying passengers, not including any interest charge or return on capital, was in excess of the two cents which the Company would receive under the joint rate, nevertheless we again call attention to the fact that in the exhibits showing the results of operation in the various periods, and showing the cost per passenger including interest charges, a full return on the value of the Company's property was not deducted. In place of such full return there was deducted only 5% interest on $1,823,091.53 (the amount of the First Mortgage and Notes), which is equivalent to a return of 6% on $1,517,576. Inasmuch as these exhibits show, without the deduction of any interest charge or return and also without the deduction of a full return on its property, that the five cent joint rate is confiscatory, it is really unimportant to determine to a nicety just what the value of the Belt Line Company's property is.

In other words, in the financial statements received in evidence there was only deducted 5% interest on $1,823,091.53 (being the amount of the First Mortgage and Notes), which interest deduction is equivalent to a 6% return on $1,517,576, so that even on a valuation of $1,000,000 less than the $2,600,000 found by the Master and approved by the District Court, the proof clearly shows that the joint rate order complained of is confiscatory.

In order to avoid any possible criticism, however, of the interest charge set forth on the Belt Line Company's exhibits, evidence of the valuation of the company's property was introduced before the Master, which evidence we

have hereinbefore referred to and set forth in the facts under the heading of Valuation of Property of Belt Line Company.

The Appellant Banton, in his Point III, criticizes the valuation found by the Master and accepted by the District Court upon the ground that it was based solely on the cost to reproduce, less depreciation, giving no weight or consideration to the original cost or any other element of value.

It appears from the evidence before the Master that the witness John H. Madden, called as a witness by the Appellee, and who was, at the time he testified, in the employ of the Appellant Transit Commission, and who was charged with the duty of valuing street railroad properties for the Transit Commission, had compiled three different sets of figures of the Belt Line Company's property, viz.:

(1) Reproduction cost as of June 30th, 1921;

(2) Reproduction cost as of 1910-1914;

(3) Original cost.

Mr. Madden was only asked by the Appellee to testify concerning the reproduction cost as of June 30th, 1921 less depreciation and concerning reproduction cost as of the time he was testifying less depreciation.

When the Master on the hearing referred to the other figures compiled by Mr. Madden, to-wit, the reproduction cost as of 1910-1914, and the original cost, counsel for the Appellee, Belt Line Company, stated that in his opinion the said figures were not relevant or competent, and the Master stated (R. p. 158):

> "All right; I believe you are right to bring out as many as you wish, and if the other side want more, they can bring them out."

Notwithstanding the fact that the witness Madden was an employee of the Appellant Transit Commission, and notwithstanding the fact that the figures in question were at all times available to the Appellant Transit Commission and the Appellant Banton (such figures being contained in the volume Exhibit BS, R. p. 259), neither the counsel for the Transit Commission nor the counsel for the District Attorney Banton saw fit to introduce such figures in evidence, and now we find the Appellant Banton criticizing the finding of the Master because he did not take into consideration the figures which neither the Appellant Banton nor the Appellant Transit Commission saw fit to introduce in evidence before the Master.

Moreover, counsel for the Appellant Banton in so strenuously urging that the figures of "original cost" should have been offered in evidence and considered by the Master, has overlooked the fact that the original cost of this property, sold at public auction, to Edward Cornell was $1,673,000 (Ex. B, R. pp. 264-269), and that the original cost of this property to the Belt Line Company was, as sanctioned and authorized by the Public Service Commission, $2,557,091.53 (Exs. M, N, O and P, being Exs. B, C, D and E annexed to the complaint, R. pp. 26-39).

The above figure is the Belt Line Company's investment in its street railroad property, and the only theory upon which original cost has ever been advanced as a basis of valuation for rate making purposes is that the public utility should be permitted to earn only on its investment.

If original cost were to be discussed as the basis of valuation, it makes no difference that the Belt Line Company has, in order to continue to operate the remainder of its street railroad, abandoned parts of its line because its investment still remains, and it has not earned enough to amortize or write off the capital loss caused by the abandonment.

Inasmuch as the above figures of original cost were before the Master, the Appellant Banton cannot justly argue that the Master gave no weight or consideration to such figures, simply because he found a valuation from the testimony of the witness Madden based upon his estimate of the cost to reproduce new as of 1921 or as of the time the witness was testifying. For all that appears in the report of the Master, the original cost of the property to the Belt Line Company, as sanctioned and authorized by the Public Service Commission, may have been a consideration which led the Master to accept the valuation of $2,600,000 herein.

In the recent case of *Missouri ex rel. Southwestern Bell Telephone Company* v. *Public Service Commission*, 262 U. S., 276, this Court said (pp. 287-288):

> "It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible.

> Estimates for tomorrow cannot ignore prices of today."

The decision of this Court in the above case was followed in *Bluefield W. W. & I. Company* v. *Public Service Commission,* 262 U. S., 679, in which case this Court reversed the Supreme Court of West Virginia, because the values that existed at the time of the regulation were disregarded.

The case of *Georgia Railway & Power Company* v. *Railroad Commission* (262 U. S., 625), cited by the Appellant Banton at page 17 of his brief, was distinguished from the *Southwestern Bell Telephone Company* case, as indicated by the statement of Mr. Justice Brandeis in his opinion therein (p. 629):

> "The case is unlike *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission, ante,* 276. * * *"

But, as we have stated above, even if original cost were to be considered in this case $2,557,091.53 is the cost of this property to the Belt Line Railway Corporation, as sanctioned and authorized by the Public Service Commission ($1,673,000 thereof represents the cost of the property at public auction and the balance represents the improvements actually put in the property), and this is the only figure of original cost in the case. When this figure is considered in connection with Mr. Madden's figure of $2,504,478.60, *not including any real estate,* the Master's finding of $2,600,000 as the valuation is amply supported. In fact it is too low.

The Appellant Banton argues in his Point IV that the

valuation found by the Master and adopted by the District Court included property not devoted to rendering service involved in the transfer traffic. The answer to such argument is that under the principle laid down by this Court in *Northern Pacific Railway Company* v. *North Dakota,* 236 U. S., 585, the joint rate traffic was properly chargeable with its proportion of the cost of the entire operation of the Company, and it is, therefore, necessary if the valuation of the property is to be considered at all, to include the entire property of the Belt Line Company.

The proof shows that all income from property not used directly by the Belt Line Company was included in the Belt Line Company's exhibits herein (Ex. J annexed to the Complaint, R. p. 46, being Ex. Y before the Master, R. p. 307; Exs. BE, BF and BG, R. pp. 330-334), and, as pointed out by the Master with respect to the real estate, such treatment of income was more to the advantage of the defendants, than if such property had been excluded from the valuation and the income therefrom excluded (R. p. 108).

With respect to the amount deducted by the Master for depreciation, if the Appellant Banton and the Appellant Transit Commission differed with Mr. Madden in his estimate of such depreciation, they were at liberty to introduce evidence thereon. The fact that they did not see fit to call any witnesses upon that subject is significant of the fact that Mr. Madden's estimate was entirely proper.

Moreover, the Master eliminated practically all the undisputed valuation of the Belt Line Company's land which was $531,000 (see *supra,* p. 16). The exclusion of practically all of this valuation of the land is sufficient to more than make up the amount of depreciation computed on any other theory than that adopted by the Special Master.

In Conclusion.

The joint rate entitling passengers to ride on the lines of two independent railroad companies for a single five-cent fare, under which the Belt Line Company received only two cents from each of such joint rate passengers, was fixed in 1912.

That rate is the only rate before the Court in this case. No other joint rate has ever been in force since 1912.

The proof shows (*supra*, p. 17) and it is undisputed, that since the fixing of the joint rate in 1912 the prices of labor and material involved in operating the Belt Line Company's railroad have advanced from 75% to 100% over what they were in 1912.

In view of such advances in prices, it is obvious that the receipt of two cents per passenger under the joint rate order made in 1912 and proper at that time, could not possibly be adequate in 1920-1925 when costs are practically double what they were in 1912. In other words, a rate of two cents per passenger as of 1912 is equivalent to a rate of only one cent per passenger in 1920-1925.

The Commission recognized that a joint rate proper in 1912 was not proper in 1920, when it found in its order of July 9, 1920, that by reason of "changed conditions," the five-cent joint rate fixed by the order of October 29th, 1912, was "insufficient to render a fair and reasonable return for the service furnished."

The Commission has at all times been free to make another joint rate but it has never done so.

The proof shows that the actual cost to the Belt Line Company (not even including depreciation or any in-

terest charges) of carrying each of its passengers during all of the periods under review in this case was far in excess of the two cents it was receiving or, but for the interlocutory injunction and the final injunction herein, would have received, from the joint rate passengers.

The proof shows that if the Belt Line Company were required to comply with the joint rate order of October 29th, 1912, the additional operating expenses would, by reason of the increased car mileage made necessary by such resumption of the joint rate, exceed the income therefrom.

There is not the slightest ground for the assumption, which is the sole basis of the Transit Commission's argument, that the additional number of joint rate passengers (8,000 to 10,000 additional per day, or an increase of 20% to 25%) could be carried without increasing the cars and car mileage. On the contrary, it is undisputed that the resumption of the joint rate would increase the Belt Line Company's expenses in the same proportion as the increase in passengers.

The argument by the Transit Commission that the additional passengers could be carried by the Belt Line Company without any increase in cars or car mileage, is directly contrary to the testimony of its own Supervising Transit Inspector, William O. Smith, who testified that even in January, 1923, without the increase in passengers which would result from the resumption of the joint rate, the Belt Line Company should increase its cars and car mileage at least 10%.

The valuation of $2,600,000, as found by the Master and as confirmed by the Court, was amply supported by the *only* evidence in the case.

The decree appealed from should be affirmed.

Dated March 4th, 1925.

Respectfully submitted,

ALFRED T. DAVISON,
Solicitor for Appellee, Belt Line Railway Corporation.

ADDISON B. SCOVILLE,
Assistant Counsel.

APPENDIX A.

A Copy of §9 of the Stock Corporation Law of the State of New York as in Force and Effect in 1912 and 1913.

"§ 9. Reorganization upon sale of corporate property and franchises.—When the property and franchises of any domestic stock corporation shall be sold by virtue of a mortgage or deed of trust, duly executed by it, or pursuant to the judgment or decree of a court of competent jurisdiction, or by virtue of any execution issued thereon, and the purchaser, his assignee or grantee shall have acquired title to the same in the manner prescribed by law, he may associate with him any number of persons, not less than the number required by law for an incorporation for similar purposes at least two-thirds of whom shall be citizens of the United States and one shall be a resident of this state, and they may become a corporation and take and possess the property and franchises thus sold, and which were at the time of the sale possessed by the corporation whose property shall have been so sold, upon making and acknowledging and filing in the offices where certificates of incorporation are required by law to be filed, a certificate in which they shall describe by name and reference to the law under which it was organized, the corporation whose property and franchises they have acquired, and the court by whose authority the sale had been made, with the date of the judgment or decree authorizing or directing the same, and a brief description of the property sold, and also the following particulars:

1. The name of the new corporation intended to be formed by the filing of such certificate; and the place where its principal office is to be located.

2. The maximum amount of its capital stock and the number of shares into which it is to be divided, specifying the classes thereof, whether common or preferred, and the amount of and rights pertaining to each class.

3. The number of directors, not less nor more than the number required by law for the old corporation, who shall manage the affairs of the new corporation, and the names and post-office addresses of the directors for the first year. They may insert in such certificate any provisions relating to the new corporation, or its management, contained in any plan or agreement which may have been entered into as provided in section ten of this chapter. Such corporation shall be vested with, and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation last owning the property sold, or its receiver, and shall be subject to all the provisions, duties and liabilities imposed by law on that corporation. Any proceedings heretofore taken in substantial compliance with this section as hereby amended, and any and all incorporations based thereon are hereby ratified and confirmed."

APPENDIX B.

A Copy of §29 of the Public Service Commissions Law of the State of New York.

"§29. *Changes in schedule; notice required; power of suspension by the commission.*—Unless the commission otherwise orders no change shall be made in any rate, fare or charge, or joint rate, fare or charge, which shall have been filed and published by a common carrier in compliance with the requirements of this chapter, except after thirty days' notice to the commission and publication for thirty days as required by section twenty-eight of this chapter, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, fare or charge will go into effect; and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication herein provided for, by duly filing and publishing in such manner as it may direct an order specifying the change so made and the time when it shall take effect; all such changes shall be immediately indicated upon its schedules by the common carrier. Whenever there shall be filed with the commission by any common carrier as defined in this act any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the commission shall have and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without

answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, fare, classification, regulation or practice; and pending such hearing and decision thereon, the commission upon filing with such schedule, and delivering to the carrier or carriers affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation or practice would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation or practice, as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation or practice had become effective. Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after the first day of January, nineteen hundred and fourteen, or of a rate sought to be increased after this section as amended takes effect, the burden of proof to show that the increase in rate or proposed increase in rate is just and reasonable shall be upon the common carrier; and the commission may give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

BANTON, DISTRICT ATTORNEY, v. BELT LINE RAILWAY CORP.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 465. Argued March 11, 12, 1925.—Decided May 25, 1925.

1. Where an order of the New York Public Service Commission establishing joint street railway routes with a maximum joint fare, long in force, became confiscatory as to one of the companies concerned and remained obligatory under the state law notwithstanding an application for relief pending before the commission on rehearing,—*held* that the company was not bound to await final action by the commission and to serve in the meantime without just compensation before suing in the federal court for an injunction. P. 415.
2. The right of a street railway company to enjoin enforcement of such an order—made by a State commission having power to establish equal and non-confiscatory rates—is not affected by the facts that another company, whose railway may benefit from the injunction through diversions of traffic from competitors, owns all the stock of the plaintiff and does not itself seek to have the order enjoined. P. 417.
3. Mere acceptance and putting into effect, by a street railway company, of an order of the New York Public Service Commission fixing a rate obligatory by the state law and which presumably was valid at the time, was not an agreement by that company to abide by the rate should it subsequently become confiscatory; nor is such consent to be imputed to a successor corporation because it was incorporated and acquired the first company's property while the order was in effect, where the acquisition was through foreclosure of a mortgage antedating the order, and under which the franchises of the first company passed unimpaired to the second, and where there is nothing in its certificate of incorporation or in the laws under which it was incorporated imposing on the second company an obligation to continue to serve for the fare fixed by the order. P. 417.
4. The power of a State to require street railways to provide reasonably adequate facilities and services even though compliance may be attended by some pecuniary disadvantage, cannot justify an order enabling passengers, by transferring from one line to

another, to ride on both for a fare so low as to deprive a company of any return on the value of the property used by it to perform the service; the State may not, under guise of regulation, compel the use and operation of a company's property for the public convenience without just compensation. P. 419.

5. The evidence in this case justifies the conclusion that resumption by the plaintiff street railway company of transfer business under an order establishing joint routes and a joint 5c fare, would require additional operating expenses in excess of the resulting increase of revenue, and that the company's fair share of the joint rate would be substantially less than the operating expenses and taxes justly chargeable to that business—hence the rate is confiscatory. P. 420.

6. In determining whether a rate fixed for transfer passengers constituting only part of the traffic of a street railway line is confiscatory, the cost of the transfer business is not the amount by which total operating expenses would be diminished by eliminating, or increased by adding, the transfer passengers; for those operating expenses which are incurred on account of all passengers carried and incapable of allocation to any class, should be attributed to the transfer passengers in fair proportion with others receiving like service. P. 421.

7. While a carrier has no constitutional right to the same rate of return on all its business, the State may not select any class of traffic for arbitrary control and regulation. P. 421.

8. In a suit to enjoin enforcement of a rate fixed by a competent state commission, the presumption is that the order was based on sufficient evidence and the burden is on the plaintiff to establish its invalidity. P. 422.

9. A commission or other legislative body in its discretion may determine to be reasonable and just a rate that is substantially higher than one merely sufficient to justify a judicial finding in a confiscation case that it is high enough to yield a just and reasonable return on the value of the property used to perform the service covered by the rate; rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate. P. 422.

10. A finding by a state commission that a street car rate is, by reason of changed operating conditions, "unjust, unreasonable, and insufficient to render a fair and reasonable return for the service furnished," plainly imports that the rate is confiscatory. P. 422.

Affirmed.

APPEAL from a decree of the District Court enjoining enforcement of an order establishing joint street car routes and a maximum joint fare. See 273 Fed. 272.

Messrs. Howard Thayer Kingsbury and *M. M. Fertig,* with whom *Messrs. George P. Nicholson* and *George H. Stover* were on the briefs, for appellants.

Mr. Alfred T. Davison, for appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was commenced December 16, 1920, by appellee to enjoin the enforcement of an order of the New York Public Service Commission, First District, (succeeded by the Transit Commission), made October 29, 1912. The order established joint routes on street railways in New York City and prescribed five cents as the maximum joint fare. Appellee's street railway formed a part of some of such routes. The complaint alleged that the order deprived appellee of any return on the value of its property used to perform the service covered by the joint fare complained of, and violated the due process and equal protection clauses of the Fourteenth Amendment, and prayed injunction against the enforcement of the order in respect of certain lines with which its railroad connected. A temporary injunction was granted by a court of three judges. § 266, Judicial Code. 273 Fed. 272. A master took the evidence and reported that the order was confiscatory. The district court confirmed his findings and entered decree as prayed. Appeal was taken under § 238, Judicial Code.

1. Appellants contend that, when this suit was commenced, the rate making process was not completed, and that the appellee had not exhausted its legal remedies in the state tribunals. The point is without merit. The order complained of had been in force for more than eight

years. The laws of the State required it to be obeyed, and prescribed penalties for failure to comply with it. See § 56, Public Service Commission Law, c. 48, Consolidated Laws, New York. May 11, 1920, the receiver of the New York Street Railways Company applied to the commission to be relieved from the requirements of the order, and, May 18, appellee joined in that application and prayed for the elimination of the joint fare between its lines and the lines of other companies, except those of the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company. May 22, appellee filed with the commission a revised joint tariff, to take effect June 22, eliminating the joint fare of five cents. But on June 18, the commission suspended this tariff, and so compelled appellee to continue to comply with the order of October 29, 1912. July 9, the commission found the fare of five cents too low and prescribed in its stead a joint fare of seven cents, to take effect September 13. Appellee, on July 23, applied for a rehearing under § 22 of the Public Service Commission Law. It alleged that the joint fare of seven cents would be confiscatory; and that the evidence submitted had no reference to a joint or through rate of seven cents. August 28, the receiver also applied for a rehearing. August 31, the commission granted a rehearing to commence November 5, and postponed the taking effect of the joint fare of seven cents until such time as the commission might fix, at or after the termination of the rehearing. On November 5, the rehearing was commenced, and the testimony was closed November 10. There has been no determination of the matter by the commission, and so the order fixing joint fares at seven cents never took effect. Neither the original application nor the petition for rehearing relieved appellee of the burden of compliance with the order of October 29, 1912. No application to the commission for relief was required by the state law. None was necessary

as a condition precedent to the suit. See *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 48; *United States* v. *Abilene & So. Ry. Co.*, 265 U. S 274, 282. On the point under consideration, it must be assumed that the joint fare of five cents was confiscatory as alleged. The continued enforcement of that rate would operate to take appellee's property without just compensation and to compel it to suffer daily confiscation. Notwithstanding the matter was pending on rehearing, the appellee had the right to sue in the federal court to enjoin the enforcement of the rate. It was not bound to await final action by the commission and, if the rate was in fact confiscatory, to serve in the meantime without just compensation. See *Pacific Telephone Company* v. *Kuykendall*, 265 U. S. 196, 204; *Oklahoma Gas Company* v. *Russell*, 261 U. S. 290, 293; *Love* v. *Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 326.

2. Appellants complain that appellee has not sought injunction against the operation of the order as to the lines of the Third Avenue Company,—which owns the stock of the appellee,—and asserts that a diversion of traffic from other lines to that company has resulted from the injunction. The lines, as to which the order was enjoined, are relieved by the decree from the obligation of dividing the joint fare of five cents. If the rates enjoined are confiscatory, appellee is entitled to relief, notwithstanding its obedience to the order in respect of other lines and fares. It was not bound to attack the prescribed rates as to all the routes. It is not suggested that the commission is without power to prescribe equal and non-confiscatory rates. The effect of the injunction on the business of the Third Avenue Company and its competitors is not involved in this suit; nor are they complaining.

3. Appellants insist that the appellee voluntarily assumed the obligation to carry transfer passengers pur-

suant to the order of October 29, 1912 for two cents each; and having been incorporated and having acquired its property subsequent and subject to such order, it is not entitled to complain of the order as an infringement of any constitutional right.

The commission had power to establish through routes and fix joint fares. The law required street railroad corporations to comply with every order made by the commission, and prescribed penalties to enforce such orders. See subd. 3, § 49; § 56, Public Service Commission Law, *supra*. The Central Park, North & East River Railroad Company, appellee's predecessor, accepted the order, and put in effect the prescribed joint fare of five cents. There is no suggestion that it was not bound to do so, or that the order was not then valid and binding on the company. A rate that is just and reasonable when prescribed, subsequently may become too low, unreasonable and confiscatory. See *Bluefield Company* v. *Public Service Commission*, 262 U. S. 679, 693; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 400. That company did not agree to serve for the prescribed joint fare of five cents, and was not bound to do so if the rate was found to be or if thereafter it should become, confiscatory. It did not surrender the protection of the Fourteenth Amendment.

The Central Park Company, many years before the order of October 29, 1912, was made, gave a mortgage on all its property, rights and franchises. November 14, 1912, one Cornell purchased at foreclosure sale. December 24, 1912, under § 9 (now § 96) of the Stock Corporation Law, c. 59, Consolidated Laws, New York, Cornell and others became incorporated as the Belt Line Railway Corporation, the appellee. That corporation through such sale and by virtue of the provisions of § 9 succeeded to "all the rights, privileges and franchises which at the time of such sale belonged to, or were vested in the cor-

poration last owning the property sold"; and became "subject to all the provisions, duties and liabilities imposed by law on that [the predecessor] corporation." The franchise of the mortgagor was not destroyed. *People* v. *O'Brien*, 111 N. Y. 1, 41, *et seq.* The rights of the mortgagee and of the purchasers were inviolable. *People ex rel. Third Avenue Ry. Co.* v. *Public Service Commission*, 203 N. Y. 299, 308. There is nothing in appellee's certificate of incorporation or the laws under which it was organized that imposes upon it any obligation to continue to serve for a portion of the joint fare of five cents. The commission's order constitutes no part of the charter of appellee; and we find no agreement by appellee, expressed or implied, to comply with the order. The district court rightly held that *Interstate Railway Company* v. *Massachusetts*, 207 U. S. 79, does not apply.

4. It is asserted that the transfer order was not confiscatory, because it was a reasonable service requirement, and also because the additional expense which would be involved by a resumption of transfers would not exceed the additional revenue which would be derived from transfer passengers.

The order was made under subd. 3, § 49, Public Commission Law, *supra*. Its purpose was to enable a passenger, by making a change from the car of one company to the car of another, to ride on the lines of both for a single fare of five cents. The service was not affected by the order. Change of cars remained necessary. The designation of transfer points and the requirement that transfer tickets be given and received by carriers were for the purpose of giving to the passenger the additional transportation without additional payment. The amount of the fare prescribed was not essential and had no relation to the use of connecting lines for a continuous journey. The State has power to require street railways and like utilities to provide reasonably adequate

facilities and services, even though compliance may be attended by some pecuniary disadvantage. *Railroad Commission* v. *Eastern Texas R. R.*, 264 U. S. 79, 85, and cases cited. But that rule is not applicable here; and the cases referred to do not support appellant's contention. The commission under the guise of regulation may not compel the use and operation of the company's property for public convenience without just compensation.

The evidence sustains the finding of the master and the district court that the joint fare of five cents is confiscatory.

At the time of the foreclosure, appellee's predecessor, the Central Park Company, operated a street railway across town on Fifty-ninth Street and up and down town on the east side and on the west side of Manhattan Island from Fifty-ninth Street to the Battery. The order required the company to exchange transfers with the lines on First, Second, Third, Lexington, Madison, Sixth and Seventh Avenues, Broadway, and Eighth, Ninth and Tenth Avenues. In October, 1919, and February, 1920, the receiver of the New York Railways Company returned the leased lines on Eighth, Ninth and Madison Avenues to their owners, who were not named in or bound by the order. This eliminated some of the through routes. June 3, 1919, with the approval of the commission, appellee abandoned the line on the east side, and, March 24, 1921, abandoned the line on the west side. This left operated by appellee only the Fifty-ninth Street line from First Avenue to Tenth Avenue, and south on Tenth Avenue to Fifty-fourth Street. It then exchanged transfers at intersections of Fifty-ninth Street and First, Second, Third, Lexington, Sixth and Seventh Avenues, Broadway, and Tenth Avenue. The decree, following the prayer of the complaint, enjoins the enforcement of the order, except as to transfers at First and Third Avenues, Broadway and Tenth Avenue.

There is involved only the rates applicable to a part of the company's business. In this respect, the case is similar to *Northern Pacific Railway* v. *North Dakota,* 236 U. S. 585; *Norfolk & Western Ry.* v. *West Virginia,* 236 U. S. 605, and *Northern Pacific Railway* v. *Department of Public Works of Washington,* 268 U. S. 39. The applicable law is plain. The State is without power to require the traffic covered by the fare enjoined to be carried at a loss or without substantial compensation over its proper cost. And such cost includes not only the expenditures, if any, incurred exclusively for that traffic, but also a just proportion of the expenses incurred for all traffic of which that in question forms a part. The cost of doing such business is not, and properly cannot be, limited to the amount by which total operating expenses would be diminished by the elimination of, or increased by adding, the transfer passengers in question. It would be arbitrary and unjust to charge to that class of business only the amount by which the operating expenses were, or would be, increased by adding that to the other traffic carried. Outlays are none the less attributable to transfer passengers because also applicable to other traffic. Operating expenses which are incurred on account of all passengers carried, and which are not capable of direct allocation to any class, should be attributed to the transfer passengers in question in like proportion as such expenses are fairly chargeable to other passengers receiving like service. While the carrier has no constitutional right to the same rate or percentage of return on all its business, the State may not select any class of traffic for arbitrary control and regulation. Broad as is its power to regulate, the State does not enjoy the freedom of an owner. Appellee's property is held in private ownership; and, subject to reasonable regulation in the public interest, the management and right to control the business policy of the company belong to its owners. *Northern Pacific Railway* v.

North Dakota, supra, 595, 596; *Norfolk & Western Ry.* v. *West Virginia, supra,* 609; *Interstate Commerce Commission* v. *Chicago G. W. Ry.,* 209 U. S. 108, 118.

It does not appear whether the commission, when making the order, acted without or upon sufficient evidence. *Northern Pacific Railway* v. *Department of Public Works of Washington, supra.* But the presumption is that the order was reasonable and valid, and the burden was on appellee to establish its invalidity. It is well known, and the court will take judicial notice of the fact, that the purchasing power of money has been much less since 1917 than it was in 1912, when the order was made; and that the cost of labor, materials and supplies necessary for the proper operation and maintenance of street railways has greatly increased. In the preamble to its order of July 20, 1920, prescribing a joint fare of seven cents instead of five cents, the commission stated: "The Commission after a careful consideration of the testimony and briefs submitted by counsel, being of the opinion that the convenience of the travelling public necessitates the continuance of the said transfers, but that the maximum joint rate of five cents fixed in the said order of October 29, 1920, [1912] is, by reason of the changed conditions under which the said railroad companies are operating, unjust, unreasonable, and insufficient to render a fair and reasonable return for the service furnished, it is ordered . . ." etc. Appellants argue that this does not amount to a finding that the joint fare of five cents is confiscatory. But clearly, the language properly may be taken to mean that the rate is too low and violates the Constitution. That is the plain import of the words used. A commission or other legislative body, in its discretion, may determine to be reasonable and just a rate that is substantially higher than one merely sufficient to justify a judicial finding in a confiscation case that it is high enough to yield a just and reasonable return on the value of the property

used to perform the service covered by the rate. The mere fact that a rate is non-confiscatory does not indicate that it must be deemed to be just and reasonable. It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate, *Trier* v. *C., St. P., M. & O. Ry. Co.,* 30 I. C. C. 352, 355; *Holmes & Hallowell Co.* v. *G. N. Ry. Co.,* 37 I. C. C. 625, 635; *Dimmitt-Caudle-Smith Live Stock Co.* v. *R. R. Co.,* 47 I. C. C. 287, 298; *Detroit & M. R. Co.* v. *Michigan Railroad Commission,* 203 Fed. 864, 870. But the language above quoted does not show, and there is nothing to suggest, that the commission had in mind or intended any such distinction.

About the time the order of October 29, 1912, became effective, the carriers agreed upon a division of the joint fare. There was assigned to the appellee two cents and to the other carriers three cents out of each fare. This apportionment was accepted by the master and district court. It is not challenged by any assignment of error; and it does not appear that appellee was entitled to more.

The evidence shows that, upon the authorization of the commission, appellee issued capital stock to the amount of $734,000, bonds for $1,750,000, and a note for $73,091.53. The total is $2,557,091.53. But, because of abandonments, changes and lack of supplementing evidence, this figure is not a good indication of the cost or of the value of the property in use at the time of the trial. At the trial, appellee called a valuation engineer who, in May, 1921, had been employed by the commission to make a valuation of all the street railroads in New York City. His estimate of the cost of reproduction of appellee's property in 1921 was $2,859,754. He deducted from this $77,000 on account of errors in the inventory and $128,246, his estimate of the cost of putting the property in first-class condition, leaving $2,654,508. There

was other evidence of value. The master and district court found the value to be $2,600,000. Appellants contend that this finding is not sustained by the evidence. In the view we take of this case, it is not necessary to determine the value of the property, or whether total revenue exceeds total operating expenses and taxes by a sum sufficient to pay a reasonable return on the value of all the property. However, we are satisfied by the evidence that a fair and reasonable return on the value would be in excess of $91,154.58, the annual interest at five per cent. on the indebtedness of $1,823,091.53,—evidenced by the bonds and note.

There follows a statement showing by fiscal years, ended June 30, and for three months ending September 30, 1922, (1) the number of passengers carried at five cents each; (2) the number of joint rate passengers carried at two cents each; (3) the average revenue per passenger, exclusive of free transfer passengers; (4) the average cost per passenger, including operating expenses and taxes, but excluding any amount for depreciation or interest; (5) the average cost per passenger, exclusive of depreciation, but including interest at five per cent. on the company's bonds and note.

	(1)	(2)	(3)	(4)	(5)
1918.....	6,450,687	13,512,033	2.9 c.	2.75c.	3.20c.
1919.....	5,440,766	12,817,674	2.89c.	2.49c.	3.00c.
1920.....	7,186,735	10,171,479	3.2 c.	2.93c.	3.46c.
1921.....	8,119,325	7,948,148	3.5 c.	3.52c.	4.10c.
1922.....	8,100,009	5,720,102	3.68c.	2.92c.	3.58c.
*.....	1,690,229	1,426,923	3.6 c.	3.03c.	3.77c.

These figures show that the operating expenses and taxes, both before and after the injunction, substantially exceeded two cents, the amount received by appellee per transfer passenger. Exclusive of any allowance for a depreciation reserve or for interest, the average cost per

* Three months ended September 30, 1922.

passenger has been from about 24 per cent. to about 51 per cent. in excess of two cents; and, if interest on the debt at five per cent. be included, it appears that the excess has been from about 50 per cent. to 105 per cent. And the record shows that for some time prior to the injunction the total revenue from all sources, including revenue for transportation, advertising, rentals and interest on deposits, was less than a sum sufficient to cover operating expenses, taxes and interest on the debt, and also shows that both before and after the injunction such total revenue was not sufficient to yield a reasonable return on the value of the property, after paying operating expenses and taxes.

The master found that a resumption of the transfer traffic enjoined would result in an increase of revenue of $46,326.72 per year and of operating expenses of $105,900 per year. These findings were not confirmed. The district court found that the revenue would be increased by about $42,000 per year and operating expenses about $46,000 per year.

The evidence undoubtedly justifies the conclusion that a resumption of such transfer business would require additional operating expenses in an amount in excess of the resulting increase of revenue, and that appellee's fair share of the joint rate would be substantially less than the operating expenses and taxes justly chargeable to that business. It follows that the rate is confiscatory. We need not determine the value of the property attributable to the traffic in question or what would constitute a reasonable rate of return.

Decree affirmed.